(14)

No. 91-119-CSX
Status: GRANTED

Title: Wisconsin Department of Revenue, Petitioner
v.
William Wrigley, Jr., Co.

Docketed:
July 19, 1991

Court: Supreme Court of Wisconsin

Counsel for petitioner: Creeron,F. Thomas, Creeron,F. Thomas

Counsel for respondent: Janaszek,Barbara J., Williams,H. Randolph, Prettyman Jr.,E. Barrett

Time to file ext by J. Stevene to & inc 7/19/91
CITED. Ptn amiled July 19; recd July 22, 1991.

Entry	Date	Note	Proceedings and Orders
1	May 10 1991	G	Application (A90-850) to extend the time to file a petition for a writ of certiorari from May 20, 1991 to July 19, 1991, submitted to Justice Stevens.
2	May 13 1991		Application (A90-850) granted by Justice Stevens extending the time to file until July 19, 1991.
3	Jul 19 1991	G	Petition for writ of certiorari filed.
4	Aug 16 1991		Brief of respondent William Wrigley, Jr. Company in opposition filed.
5	Aug 19 1991		Brief amici curiae of Iowa, et al. filed.
6	Aug 21 1991		DISTRIBUTED. September 30, 1991
7	Oct 7 1991		Petition GRANTED. The case is set for oral argument in tandem with No. 91-194, Quill Corp. v. North Dakota.
			**********
18	Oct 31 1991		Record filed.
		*	Certified record and proceedings Circuit Court of Dane County, Wisconsin (1 Box)
8	Nov 4 1991		Record filed.
		*	Certified briefs Supreme Court of Wisconsin (1 box)
9	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 22, 1992. (3RD CASE)
12	Nov 20 1991		Joint appendix filed.
13	Nov 20 1991		Brief of petitioner Wisconsin Department of Revenue filed.
10	Nov 21 1991		Brief amicus curiae of City of New York filed.
11	Nov 21 1991		Brief amici curiae of Iowa, et al. filed.
14	Nov 21 1991		Brief amici curiae of New Jersey, Alaska and Arkansas filed.
16	Nov 21 1991		Brief amicus curiae of Multistate Tax Commission filed.
17	Nov 27 1991		CIRCULATED.
19	Dec 19 1991	X	Brief amicus curiae of Committee on State Taxation of Council of State Chambers filed.
21	Dec 19 1991	X	Brief amicus curiae of Direct Selling Association filed.
20	Dec 20 1991	X	Brief of respondent William Wrigley Jr. Company filed.
22	Jan 14 1992	X	Reply brief of petitioner Wisconsin Department of Revenue filed.
23	Jan 22 1992		Argued

91-119

No. _____

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For a Writ of Certiorari
To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In attempting to fairly apportion otherwise taxable income from sales of tangible personal property within their boundaries by foreign corporations, how are the "solicitation" and "delivery" requirements in Pub. L. No. 86-272 to be applied by state taxing authorities in the face of conflicting decisions from state courts of last resort as to whether those requirements admit of a *de minimis* exception and as to whether "solicitation" encompasses post-sale activities "incidental" to the canvassing of retail customers.

LIST OF PARTIES

The parties to this action are the Wisconsin Department of Revenue and the William Wrigley, Jr. Company.

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In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For a Writ of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

The State of Wisconsin respectfully requests that a writ of certiorari issue to review a final judgment of the Supreme Court of Wisconsin voiding six years of franchise tax assessments against the respondent.

OPINIONS BELOW

The decision from which review is sought is published and is reprinted in its entirety in the appendix (A-1).

William Wrigley, Jr. Co. v. Dept. of Rev., 160 Wis. 2d 53, 465 N.W.2d 800 (1991). The Wisconsin Tax Appeals Commission had earlier upheld Wisconsin's franchise tax assessment against Wrigley (A-218). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶202-792, 1986 Wisc. Tax LEXIS 4 (November 18, 1986). After a procedural remand (A-204), *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 86-CV-6679 and 86-CV-6796, Wis. Tax Rptr. [CCH] ¶202-905 (August 20, 1987), the Commission reinstated its original decision (A-163). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶202-792, 1987 Wisc. Tax LEXIS 5 (November 25, 1987).

On appeal, the circuit court reversed the Commission's decision reinstating the assessment (A-78). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 87-CV-7468 and 87-CV-7478, Wis. Tax Rptr. [CCH] ¶203-000 (October 19,

1988). In a published decision, the Wisconsin Court of Appeals reversed the circuit court, finding that the Commission's decision had been correct (A-46). *William Wrigley, Jr. Co. v. Wis. Dept. of Rev.*, 153 Wis. 2d 559, 451 N.W.2d 444 (Wis. App. 1989). The Wisconsin Supreme Court, in turn, reversed the court of appeals' decision (A-1).

JURISDICTION

The judgment from which review is sought was issued on February 19, 1991 (A-1). Pursuant to S. Ct. R. 30.3, Justice Stevens issued an order granting petitioner an extension of time through July 19, 1991, in which to file a petition for a writ of certiorari. *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, No. A-850 (May 13, 1991). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 2101(c).

STATUTE INVOLVED

Pub. L. No. 86-272, codified at 15 U.S.C. § 381, provides, in relevant part:

> Minimum Standards
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are *sent outside the State for approval* or rejection, *and*, if approved, are *filled by shipment or delivery from a point outside the State*; and
>
> (2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(Emphasis supplied.)

STATEMENT OF THE CASE

From its inception, the focal point of this case has been whether "[t]he ongoing business activities of the William Wrigley Jr. Company in the State of Wisconsin during the years 1973 through 1978 exceeded the 'solicitation of orders' protected by 15 U.S.C. [§] 381 (P.L. 86-272)." (A-243.) Each successive tribunal that has examined the merits of that issue has reached the opposite conclusion concerning that question (A-1; A-46; A-78; A-218).

During the years at issue, Wrigley had an extensive dollar volume of sales in Wisconsin:

1973 - $2,797,055	1976 - $4,025,372
1974 - $3,184,703	1977 - $4,091,568
1975 - $3,898,041	1978 - $4,392,202

(A-219). Using a three-factor apportionment formula (payroll, property, and sales) similar to those employed by all states that impose an income or franchise tax on multistate corporations, the following amounts of income

were determined to be apportionable to Wisconsin during those years (A-220):

1973 - $ 86,663	1976 - $379,475
1974 - $ 90,185	1977 - $342,429
1975 - $316,069	1978 - $443,374

Since Wrigley had filed returns only in its home state of Illinois and in the states where it had offices or manufacturing facilities, Wisconsin issued a franchise tax assessment on October 6, 1980 in the total amount of $246,641.04 for all six years, including substantial interest and penalties, some of which were later eliminated by the Commission (A-220, 222).

Wrigley manufactured chewing gum outside of Wisconsin and made sales through four or five sales representatives who lived and worked in Wisconsin, servicing both wholesale (direct) and retail (indirect) accounts (A-223). Wholesale orders were submitted to and shipped from Illinois (A-230).

Wrigley's sales representatives maintained substantial stocks of gum, carried on company books as inventory, sufficient to enable each of them to replace stale gum

located at all of their account locations (A-224-225). They also engaged in other post-sale activities including installation and maintenance of both regular retail product and promotional displays, checking inventory in such displays and advising retailers concerning their design and content (A-224-225). On the average of once per month when necessary to complete particular displays, they would issue "agency stock checks" in small dollar amounts instructing Wrigley to bill the retailer's wholesaler who would then bill the retailer (A-230). They would then furnish gum to retailers from their own individual supplies located in Wisconsin (A-230).

The sales territories in Wisconsin were located in the Milwaukee Region, which was run by a resident regional sales manager who was not assigned a retail territory (A-224). The resident regional manager prepared sales reports, trained and supervised each sales representative and was involved in personnel decisions including hiring, firing and salary recommendations (A-231). From 1973-1975, the regional manager maintained an office in

his home for which he claimed Wisconsin income tax deductions and where he held yearly training sessions (A-230-231). He also intervened in credit transactions a few times each year (A-232).

In 1973, when the regional manager terminated an employee, he rented and was reimbursed by Wrigley for the cost of warehouse space to store a company car, cases of gum and display materials; a similar arrangement continued for three years after a replacement was hired (A-67). Again in 1976, and through the end of the period at issue, that sales representative rented and was reimbursed by Wrigley for warehouse space because his display materials and stock of gum still would not fit in his apartment (A-225).

Other facts appear in the decision of the court of appeals, 451 N.W.2d at 450-51, and in the decision of the Wisconsin Supreme Court, 465 N.W.2d at 803-06.

The Wisconsin Tax Appeals Commission, using standards promulgated by the Multistate Tax Commission for guidance, held that the following activities were not

closely related to solicitation: 1) maintenance of a stock of gum and replacement of stale gum; 2) maintaining product displays with respect to location, design and content; 3) direct gum sales by means of agency stock checks; 4) maintenance of offices in the home by the resident regional managers; 5) conducting training sessions; 6) training, evaluating the performance of and recommending hiring, firing and compensation for sales representatives by the regional manager; 7) preparation of periodic sales analyses and reports by the regional manager; 8) involvement in credit transactions by the regional manager for tax years 1973-1975; 9) rental of storage space; and 10) non-incidental advertising (A-249-253).

The Dane County Circuit Court held that all of Wrigley's Wisconsin activities constituted "'lesser, included phases' which Congress intended to . . . protec[t]" (A-140) (citation omitted). It also viewed infrequent exceptions to Wrigley's usual practices "[a]s *de minimis*" (A-142). It

therefore reversed the Commission's decision upholding the assessment (A-143).

The Wisconsin Court of Appeals defined the term "solicitation" as "those generally accepted or customary acts in the industry which lead to the placing of orders." *Wrigley*, 451 N.W.2d at 448. It therefore determined that "solicitation" "should not include those acts which follow as a natural result of the transaction." *Wrigley*, 451 N.W.2d at 449. Employing this standard, it held that Wrigley was not entitled to claim the protection offered by the statute: "Wrigley's Wisconsin employees were not just 'missionaries.' They were hirers, firers, meeting organizers, trainers, customer credit 'intervenors' or 'mediators,' renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers." *Wrigley*, 451 N.W.2d at 452. It then reinstated the assessment overturned by the circuit court.

Reversing, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between buyer and seller" even when "th[e] orders

may be future orders." *Wrigley*, 465 N.W.2d at 809, 811. It determined that factors to be considered in employing this standard include whether the company maintains a warehouse or a stock of goods within the state, the type of business involved, the manner in which orders are solicited and the way products are sold. *Wrigley*, 465 N.W.2d at 812. It also found that, in applying these factors, deviations from the norm may be considered *de minimis*. *Wrigley*, 465 N.W.2d at 812. That court therefore held that federal law precluded Wisconsin from assessing any franchise tax whatsoever for the six-year period at issue. *Wrigley*, 465 N.W.2d at 812.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT IS INCONSISTENT WITH DECISIONS OF THIS COURT ARTICULATING PRINCIPLES OF STATUTORY CONSTRUCTION CONCERNING STATUTES INVOLVING FEDERAL-STATE RELATIONS BOTH IN GENERAL AND WITH REFERENCE TO THE PARTICULAR STATUTE AT ISSUE IN THIS CASE.

A. In exercising its powers under the Commerce Clause, Congress is presumed not to have significantly altered the preexisting authority of the states unless it uses unmistakable language to do so.

When acting under the Commerce Clause, Congress may override the states' preexisting powers or sovereign authority, but it must "do[] so clearly." *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 2281 (1989). Where Congressional preemption of state regulatory activity is less than clear, it will not be implied by this Court. *See generally, Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 643 n.33 (1986).

These principles of statutory construction have already been applied by the Court to Pub. L. No. 86-272: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 282-83 (1972), *quoting United States v. Bass*, 404 U.S. 336, 349 (1971).

The Wisconsin Supreme Court's construction of the term "solicitation" should be tested against this canon of statutory construction.

B. The Wisconsin Supreme Court's broad construction of the term "solicitation" is not supported by unmistakably clear language in the text of the statute.

Presumptively all of the income of a single corporation is apportionable. *See Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 219 (1980). Although due process limits a state's ability to apportion the income of a foreign corporation, due process requires only that there be 1) a "minimal connection" or nexus between the interstate activities and the taxing state, and 2) a "rational relationship" between income attributed to the state and the intrastate values of the enterprise. *Trinova Corp. v. Michigan Dept. of Treasury*, ___ U.S. ___, 111 S. Ct. 818, 828 (1991). A "wide range of benefits" including the "advantages of a civilized society" satisfy the requirement that the tax fairly relate to benefits the state provides.

Goldberg v. Sweet, 488 U.S. 252, 257 (1989). "The simple but controlling question is whether the state has given anything for which it can ask return." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

In *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 454 (1959), the Court held that due process permits the imposition of a fairly apportioned tax where a foreign corporation engages in "a regular and systematic course of solicitation of orders for the sale of its products." In *Heublein*, 409 U.S. at 279–280, this Court then said:

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S. Ct. 357, 67 A.L.R.2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 359 U.S., at 452, 3 L.Ed.2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381] within seven months.

> In this statute, Congress attempted to allay the apprehension of businessmen that "*mere solicitation*" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal.*

(Footnotes omitted; emphasis supplied.)

Although *Portland Cement* may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. In each instance, a state court decision had extended the reasoning in *Portland Cement* so as to permit the imposition of state income tax on out-of-state corporations even though those corporations only employed non-resident "drummers" or "missionary men" and did not maintain any physical facilities within the taxing state. *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959); *International Shoe Co. v. Fontenot*, 236 La. 279, 107

So. 2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). It is "generally believed" that Pub. L. No. 86-272 did not overrule *Portland Cement*, but did alter the rule stated in *Fontenot*. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 302 (1985).

The Wisconsin Supreme Court's construction of the statute alters the preexisting powers of the states to a degree not supported by clearly expressed textual language. Even after the passage of the statute, apportionment remained the general rule, with "solicitation" constituting a new, but limited exception. Since the statute alters the preexisting authority of the states to fairly apportion income derived from sales by foreign corporations within their boundaries, any ambiguity in its terms is subject to the narrowest construction that produces predictability.

The central theme that permeates the Wisconsin Supreme Court's decision is that immunity is the rule and taxation the exception. That statutory construct is

inconsistent with the principles of federalism articulated by the Court in *Heublein* and therefore should not be allowed to stand.

The Wisconsin Supreme Court's post-sale "incidental activity" gloss on the term "solicitation" also results in a lack of predictability and is therefore contrary to the Congressional goals of clarity and certainty identified by the Court in *Heublein*. In fact, the Wisconsin Supreme Court acknowledged that the court of appeals' "pre-sale/post-sale test may produce consistency and predictability[.]" *Wrigley*, 465 N.W.2d at 809. Yet, it held that any activity whose purpose is "encouraging future orders" constitutes "solicitation." *Id.* The fundamental problem with such a standard is that it could be applied to immunize virtually any activity conducted by a foreign corporation that is exclusively engaged in the business of selling tangible personal property in retail establishments. That standard is therefore entirely at odds with the principal goal surrounding the enactment of Pub. L.

No. 86-272 and repugnant to this Court's analysis of the statute in *Heublein*.

C. When federal statutory terminology is unambiguous, it must be enforced by the courts.

Unless exceptional circumstances are present, judicial inquiry is complete when particular terms in a statute are found to be unambiguous. *Demarest v. Manspeaker*, ___ U.S. ___, 111 S. Ct. 599, 604 (1991). In those situations, inquiry into legislative history becomes "irrelevant." *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). In those situations, a court's sole obligation is to enforce the unambiguous statutory terminology. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

In sum, to the extent that a federal statute contains unambiguous terms, a state court's sole obligation is to enforce them.

D. The Wisconsin Supreme Court failed to enforce the unambiguous term "only" in Pub. L. No. 86-272.

The agency stock check procedure periodically employed by Wrigley involved delivery to a retailer from a stock of goods within the state. And Wrigley's rental of warehouse space is hardly a commonly understood form of "solicitation." In order to hurdle these and other problems surrounding Wrigley's actual conduct in this case, the Wisconsin Supreme Court effectively held that compliance with the statute is excused unless *non*compliance is "of sufficient weight in the flow on interstate commerce." *Wrigley*, 465 N.W.2d at 811.

Not only does that holding excise the word "only" from the statute, it also inverts its entire premise. The statute *permits* taxation unless the taxpayer's "only" activities involve a specified manner of "solicitation" and "delivery." The Wisconsin Supreme Court's holding *prohibits* taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum of those two activities. Such a *de minimis* standard hardly promotes clarity or removes

uncertainty, since its bounds can never be ascertained in advance by either the taxpayer or the state taxing authority.

The *de minimis* concept is also utterly inconsistent with due process apportionment principles. For due process purposes, an isolated incursion into a state by a foreign corporation may not be sufficient to create nexus sufficient to justify the imposition of a fairly apportioned tax. But systematic exploitation of a domestic market by such a corporation is precisely the kind of activity that warrants the imposition of that kind of tax. A *de minimis* concept, however, permits a foreign corporation to measure any claimed violation of the requirements of the statute against its success in exploiting the domestic market. The *greater* that success, which would normally justify the imposition of a fairly apportioned tax, the *more* tenable a *de minimis* claim will be.

Further review is warranted because the Wisconsin Supreme Court's construction of Pub. L. No. 86-272 is inconsistent with both decisions of this Court employing

canons of statutory construction applicable to federal statutes involving federal-state relations and with traditional due process apportionment principles.

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS INCONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT CONSTRUING THE REQUIREMENTS OF PUB. L. NO. 86-272.

A. State courts have employed three different constructions of the term "solicitation."

The Wisconsin Supreme Court held that the statute immunizes "activities in Wisconsin . . . incidental to the solicitation of orders." *Wrigley*, 465 N.W.2d at 811.

The term "solicitation" in Pub. L. No. 86-272 has been "a definitional quagmire." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:11, at 390 (Supp. 1990). The Georgia Supreme Court has described the three definitions of "solicitation" developed by the state courts in the following fashion:

> [C]ourts have adopted one of three successively more inclusive definitions of "solicitation": (1) the specific act of asking a customer to purchase one's

> product . . . [1]; (2) any act which *leads to* the purchase of one's product as opposed to acts which *follow from* the purchase [2] . . . ; and (3) any act which *leads to* or *follows from* the purchase so long as said act is *incidental* to the purchase . . . [3].

Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599, 600-601 (1979) (emphasis supplied; citations

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[1]Decisions of state courts of last resort perceived to have employed the narrowest of the three definitions include *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971) and *Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972).

[2]Decisions of state courts of last resort perceived to have employed definitions no broader than this intermediate standard include *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985); *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); *Jantzen, Inc. v. District of Columbia*, 395 A.2d 29 (D.C. 1978); *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1976); and *Chattanooga Glass* itself.

[3]Decisions of state courts of last resort perceived to have adopted the broadest of these three standards include *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm.*, 579 P.2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978); *Gillette Company v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978); *Coors Porcelain Company v. State*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *State v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964); and *Smith Kline & French Laboratories v. State Tax Com'n*, 241 Or. 50, 403 P.2d 375 (1965) (since repudiated).

omitted). *Accord*: *Wrigley*, 451 N.W.2d at 448; *Ringgold Coal Mining Company v. Taxation Division Director*, 4 N.J. Tax 321 (April 29, 1982).

Articles and treatises examining these three lines of authority have criticized the expansive post-sale "incidental" solicitation[4] standard both as being inconsistent with the statutory text and as resulting in uncertainty and administrative complexity. Note, *Public Law 86-272: Legislative Ambiguities and Judicial Difficulties*, 27 Vand. L. Rev. 313, 340 (1974). They have also noted that an overly-broad definition of "solicitation" may result in competitive disadvantage to intrastate domestic businesses. *Federal Limitations* § 9:14, at

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[4]In delineating those activities encompassed by the term "solicitation," the Wisconsin Supreme Court also held that an appropriate reference point is "the type of business involved[.]" *Wrigley*, 465 N.W.2d at 812. While no state court of last resort has directly addressed the implication that promulgation of specific business customs within a particular industry dictates whether immunity from taxation must be granted, the Oregon Tax Court has recognized that "many businesses, by their very nature, cannot claim the benefits of the federal statute." *Olympia Brewing Co. v. Department of Revenue*, 5 Or. T.R. 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974).

517–18. The policy reasons identified by these commentators also indicate that an overly–broad "solicitation" standard was adopted by the Wisconsin Supreme Court.

B. State courts have both accepted and rejected the premise that the statute admits of a *de minimis* exception.

The Wisconsin Supreme Court also held that, when applying the "solicitation" and "delivery" requirements of Pub. L. No. 86–272, immunity may still be claimed from a fairly apportioned tax, so long as there are only "*de minimis* deviation[s] from the usual practice" of limiting in–state activities to canvassing potential customers and forwarding orders for acceptance and approval outside the state. *Wrigley*, 465 N.W.2d at 812. It determined that any violation of the literal language of the statute is *de minimis* unless that particular activity involves a significant contribution to the flow of interstate commerce. *Wrigley*, 465 N.W.2d at 811.

A number of the courts that have expansively defined "solicitation" have indicated that the statute admits of a *de minimis* exception. *See e.g., Coors Porcelain*, 517 P.2d at 843; *Kimberly–Clark*, 416 N.E.2d at 1268. *Also see, John Ownbey Co. v. Butler*, 211 Tenn. 336, 365 S.W.2d 33, 39 (1963). But other state courts of last resort have indicated that "it is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability." *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. Banc. 1990). *U.S. Tobacco*, 386 A.2d at 477, one of the principal cases relied upon by the Wisconsin Supreme Court in other respects, also indicates that whatever "standard is employed, any nexus with the taxing state that cannot accurately be characterized as 'solicitation or orders' is sufficient to remove the protection of § 381[.]"

Commentators examining these two lines of authority have generally concluded that a "*de minimis* definition of solicitation is without legislative support." Tatarowicz, 38

Tax Lawyer at 305. Their rationale is straightforward: "Public Law 86-272 provides for no 'exceptions' to the statutory requirements that there must be *only solicitation of orders*, before an exemption from taxation will be granted." *Federal Limitations* § 9:12, at 507.

That the state courts will not achieve consensus on any of these issues is dramatically illustrated by contrasting the Wisconsin Supreme Court's decision below with the Arkansas Supreme Court's decision in *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990), decided only two months earlier. The Arkansas Supreme Court apparently found favor with the decision of the Wisconsin Court of Appeals; the Wisconsin Supreme Court rejected it. *Compare U.S. Tobacco*, 801 S.W.2d at 259 *with Wrigley*, 465 N.W.2d at 809. The Arkansas Supreme Court did not accept Pennsylvania's broad definition of "solicitation" in its earlier *U.S. Tobacco* decision; the Wisconsin Supreme Court embraced it. *Compare U.S. Tobacco*, 801 S.W.2d at 259, *with Wrigley*, 465 N.W.2d at 809-810. The Arkansas Supreme Court

determined that no *de minimis* exception of any kind exists: "It is not the frequency of the visits or volume sales however, upon which our decision turns. We are concerned with the *nature* of the Company's activities." *U.S. Tobacco*, 801 S.W.2d at 260. In contrast, the Wisconsin Supreme Court adopted a broad-based interstate commerce *de minimis* standard for both "solicitation" and "delivery" which is unparalleled in prior case law. *Wrigley*, 465 N.W.2d at 811-812. The differing approaches to the statute by these two courts are insoluble.

The conflict among the jurisdictions is both evident and more than sufficient to warrant plenary review.

III. THE ISSUE OF HOW INCOME SHOULD BE APPORTIONED WITH REFERENCE TO THE REQUIREMENTS OF PUB. L. NO. 86-272 DECIDED BY THE WISCONSIN SUPREME COURT CONSTITUTES AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Lack of a uniform federal statutory standard leads to situations where multistate corporations escape taxation on certain income and to situations where multistate corporations are subjected to multiple taxation.

The problems associated with multiple definitions of a single federal statutory standard are most easily seen in "throwback" cases under Pub. L. No. 86-272. Throwback is the corollary to the immunity that may be claimed by foreign corporations under that statute:

> The purpose of the "throwback" rule is to prevent any part of the tax base from falling through the cracks into the "[n]o-man's land" of non-taxation. Under the "throwback" rule, the sales factor provides for attribution of sales of tangible personal property to the State of origin, when the taxpayer is not taxable in the State of the purchaser. The "throwback" provision seems to revert the sales receipts to the State from which the tangible personal property was shipped in those instances where Federal Constitutional limitations or Public Law 86-272 prohibits the purchaser's State from imposing an income, franchise or similar tax.

Federal Limitations § 9:12, at 394 (Supp. 1990). The throwback principle reassigns to a state in which the taxpayer is taxable sales receipts that would normally be assigned to a state in which the taxpayer is not taxable.

The problem is that most states throw back sales in a manner consistent with the "solicitation" standard they apply to foreign corporations under Pub. L. No. 86-272. Wisconsin is such a state. *Milwaukee Seasoning Laboratories, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. [CCH] ¶202-652 (January 10, 1986). The result is often "nowhere" income that escapes taxation by any state, either because the foreign state does not impose tax under its own definition of "solicitation" or because the multistate corporation has chosen not to file in the foreign state. *See, e.g., Goldberg v. State Tax Commission*, 618 S.W.2d 635, 642 (Mo. 1981); *Ind. Dept. of State v. Continental Steel Corp.*, 399 N.E.2d 754, 756 (Ind. App. 1980); *Federal Limitations* § 9:14, at 518 and n.93.

Cases such as *John Ownbey* and *Coors Porcelain* also suggest that the potential for multiple taxation in such circumstances is very real. *Federal Limitations* § 9:12, at 503-504, 509; Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand L. Rev. 353, 395 (1976). *Also see*, Tatarowicz, 38 Tax

Lawyer at 325: "The various states' interpretations of solicitation lead to multiple taxation and create uncertainty as to one's tax liability and obligation."

Other examples are readily apparent from the Wisconsin Supreme Court's decision in *Wrigley* and the Arkansas Supreme Court's decision in *U.S. Tobacco*. Under the rationale of those decisions, Arkansas may fairly apportion the income of U.S. Tobacco, a corporation headquartered in Connecticut, but Wisconsin, which is now required to follow the "solicitation" standard applied by Pennsylvania to that very same taxpayer, may not. Similarly, Wrigley, a corporation headquartered in Illinois, will in all likelihood now be required to pay tax in Arkansas, but Wisconsin has been precluded from fairly apportioning income from those same activities. Moreover, every state that utilizes an intermediate standard similar to that employed by the Wisconsin Court of Appeals may now find support in that court's decision for assessing tax against Wrigley.

A uniform interpretation of Pub. L. No. 86-272 will eliminate these inconsistencies and significantly reduce the potential for multiple taxation and for the creation of "nowhere" income.

B. A single definitional standard would simplify state tax administration and eliminate taxpayer confusion.

Fifteen years after the enactment of the statute, one analysis of Pub. L. No. 86-272 suggested that "[i]f Congress fails to act . . . a decision by the United States Supreme Court interpreting solicitation would be helpful in bringing uniformity to the area." Note, *Public Law 86-272*, 27 Vand. L. Rev. at 339. Shortly thereafter, another suggested that "[a] decision, or perhaps a series of decisions, by the Supreme Court of the United States could help to remove this tapestry of confusion." Hartman, 29 Vand L. Rev. at 397 (1976). In over three decades since the enactment of the statute, Congress has done nothing. This "failure to have trustworthy guidelines on the meaning of 'solicitation of orders' and 'delivery' is most

unfortunate for *both* the taxpayer and the taxing authority." *Federal Limitations* § 9:14, at 518 (footnote omitted).

At present, "it appears practically impossible to distill from these cases a precise, uniform, predictively trustworthy interpretation of the scope of the[se] exemption[s]." Hartman, 29 Vand. L. Rev. at 389. There is therefore a compelling need to create "a standard on which multistate taxpayers [and state taxing authorities] may rely in conducting their business dealings." Tatarowicz, 38 Tax Lawyer at 293 n.5.

CONCLUSION

State courts of last resort have interpreted Pub. L. No. 86-272 in conflicting ways, applying drastically different legal standards in determining how and when immunity from fair apportionment consonant with due process principles is extended to foreign corporations. This lack of uniformity concerning the legal standards to be applied in attempting to fairly apportion income creates

tax problems both for states that impose income or franchise taxes and for multistate corporations with apportionable income. Pub. L. No. 86-272, a federal statute, should have a uniform interpretation that can be consistently applied by state courts, state tax tribunals, state taxing authorities and multistate corporations. Only this Court can supply that uniform interpretation.

It is therefore respectfully requested that a writ of certiorari issue to the Supreme Court of Wisconsin for the purpose of granting plenary review of that court's February 19, 1991, judgment in this matter.

Dated this 19th day of July, 1991.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For a Writ of Certiorari
To The Supreme Court of Wisconsin

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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No. 88-2265

STATE OF WISCONSIN : IN SUPREME COURT

WILLIAM WRIGLEY, JR. CO.,

Petitioner-Respondent,

Filed
February 19, 1991

v.

WISCONSIN DEPARTMENT OF REVENUE,

Appellant.

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Appellant,

v.

WILLIAM WRIGLEY, JR. CO.,

Respondent-Petitioner.

REVIEW of a decision of the court of appeals. ***REVERSED.***

DAY, J. This is a review of a court of appeals decision which reversed an order of the circuit court for Dane County, the Honorable Martha J. Bablitch, Reserve Judge,

presiding. The circuit court, reversing an order of the Wisconsin Tax Appeals Commission, held that under 15 U.S.C. sec. 381, the Wisconsin Department of Revenue (DOR) does not have the power to tax the net income of the William Wrigley, Jr. Company (Wrigley) for the years 1973 to 1978. The circuit court found that Wrigley's activities in Wisconsin were "inextricably connected to 'solicitation,'" as that term is used in 15 U.S.C. sec 381. 15 U.S.C. sec. 381 provides in part as follows:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce *if the only business activities within such State* by or on behalf of such person *during such taxable year are* either, or both, of the following:
>
> (1) *the solicitation of orders* by such person, or his representative in such State for sales of tangible personal property, which orders are *sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State*; (emphasis added). . . .

Because the circuit court held that the DOR is prohibited from assessing a tax on Wrigley, it did not decide the interest rate to be applied to the tax.

The DOR appealed, and the court of appeals reversed the order. *William Wrigley, Jr. Co., v. DOR*, 153 Wis. 2d 559, 579, 451 N.W.2d 444 (Ct. App. 1989) (Dykman, J., dissenting). The court of appeals determined that the solicitation of orders does not encompass post-sale activities which are not "'inextricably related'" to the solicitation of orders. *Id.* at 569. It held that since Wrigley engaged in such activities, Wisconsin is not prohibited from taxing Wrigley. *Id.* at 577. In addition, the court of appeals held that the franchise tax was "delinquent," and therefore subject to an eighteen percent penalty interest under sec. 71.13(1)(a)[1] and 71.10(9)(a),

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[1]Section 71.13(1)(a), Stats., (1985-86), provides in part as follows:

> Collection of delinquent taxes. (1)(a) Income and franchise taxes shall become delinquent if not paid when due under s. 71.10(9), and when delinquent shall
>
> be subject to interest at the rate of 1.5% per month until paid. . . .

1987 Act 312 renumbered the statute as sec. 71.82(2)(a).

Stats. (1985-86).[2] *Id.* at 579. Wrigley petitioned the court for review which was granted.

This case presents two issues for review: (1) Did Wrigley's activities in Wisconsin go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381, so that Wisconsin may assess and collect a tax on Wrigley's net income for the years 1973 to 1978, and (2) if Wrigley's activities are taxable, are the assessed taxes "delinquent" and therefore subject to an eighteen percent penalty interest rate pursuant to sec. 71.13(1)(a), Stats.? We conclude that Wrigley's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381. Therefore the DOR may not assess and

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[2]Section 71.10(9)(a), Stats., provides:

> **Section 71.10. Filing returns; payment of tax; tax refunds and credits; nonresident contractor's surety bond; withholding statements and wage reports. . . .(9)** All income and franchise taxes shall be paid to the department of revenue, at its office at Madison or at such other place the department designates. (a) Corporation franchise and income taxes not paid on or before the 15th day of the 3rd month following th close of the income year, shall be deemed delinquent.

collect a tax on Wrigley's net income for the years 1973 to 1978. Because we hold that the DOR is prohibited from taxing Wrigley's net income, we do not reach the second issue.

On October 6, 1980, the DOR issued Wrigley a "Notice of Franchise Tax Assessment." The notice stated that the DOR was assessing Wrigley $246,614.04 in franchise taxes for the years 1973 through 1978 because Wrigley had been engaging in corporate business activities in Wisconsin during those years. In addition, since Wrigley had not filed Wisconsin franchise tax returns, the DOR assessed Wrigley penalties, including an eighteen percent delinquent penalty interest.

Wrigley objected to the assessment, claiming that it did not engage in business in Wisconsin in a manner sufficient to subject it to Wisconsin's taxing jurisdiction. The DOR denied Wrigley's petition for a redetermination of taxes, and assessed Wrigley a total of $271,707.63 in taxes and penalties.

Wrigley appealed to the Tax Appeals Commission (Commission). On August 26 and 27, 1985, a hearing was held before Commissioner William Bradford Smith, acting as a hearing examiner. Before the Commission could issue a decision, Mr. Smith left the Commission because of a legislative reorganization. On November 18, 1986, the Commission rendered its decision without consulting Mr. Smith. It concluded that Wrigley's activities in Wisconsin went beyond the "solicitation of orders" protected by 15 U.S.C. sec. 381, and it upheld the DOR's assessment. The Commission also concluded that Wrigley was not subject to the delinquent penalty interest rate because the taxes had not yet become due, and could therefore not be considered "delinquent." Instead, the taxes were subject to the legal rate of interest, found in sec. 71.09(5)(a), Stats. (1985-86).[3]

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[3]Section 71.09(5)(a), Stats. (1985-86) provides:

> **71.09 Payment of estimated taxes.** **(5)(a)** In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if
>
> (continued...)

Both Wrigley and the DOR appealed. On August 20, 1987, the Dane County Circuit Court, Judge Michael Nowakowski, presiding, reversed the Commission's decision. The court found that since several of the Commission's findings might have been affected by the weight and credibility of the testimony at the hearing, due process required that the Commission consult Mr. Smith before deciding the case. The court also questioned some of the Commission's findings of fact, and stated that an analysis of Wrigley's activities was to be done on an annual basis, not in the aggregate. We note that 15 U.S.C. sec. 381 prohibits a state from imposing a net income tax "for any taxable year" if a person's business activities "during such taxable year" are limited to those described in the statute. *See also Ringgold Coal Mining Co. v. Taxation Division Director*, 4 N.J. Tax 321 (Apr. 29, 1982) (court analyzed company's activities on an annual basis). The

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[3](...continued)
unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

court did not reach the issue of the penalty interest rate assessment. The case was remanded to the Commission for further proceedings consistent with the court's ruling.

On remand, the Commission met with Mr. Smith and heard his views on the credibility of the witnesses and the weight to be accorded their testimony. Mr. Smith also filed a written statement with the Commission, stating that he found the Wrigley witnesses' testimony to be "extremely credible," and that he would have issued proposed findings of fact, conclusions of law, and an order in Wrigley's favor. A three-member majority of the Commission, with one member dissenting and one not participating, reinstated the original decision and order. The Commission clarified its original findings and specifically stated that it never questioned the credibility of the witnesses: their testimony was "completely accepted and accorded substantial weight."

Both Wrigley and the DOR appealed, and the circuit court consolidated their appeals. In examining the record, the circuit court found that some of the Commission's findings of fact were not supported by the evidence in the

record. In addition, the Commission "did not purport to examine the rationale of the statute itself (15 U.S.C. sec. 381), its legislative history, or the cases from other states which have construed it in a variety of circumstances." Instead, the Commission relied on the DOR's nexus regulations promulgated in 1979. It also relied on guidelines set forth in a resolution of the Multistate Tax Commission, a group of state revenue agents. *See* State Tax Guide, Multistate Taxation, sec. 351, (CCH 1980). In analyzing Wrigley's activities, the Commission applied these guidelines, which were not cited by either party, and did not refer to case law, cited by both parties.

The circuit court, in interpreting 15 U.S.C. sec. 381, analyzed the approaches other state courts have taken and the statute's legislative history. The circuit court concluded that the activities of Wrigley's salespeople were "solicitation" or so "inextricably connected to solicitation" as to amount to the same thing. Finally, the court stated that even if some of Wrigley's activities were viewed as

sales, they were "infrequent exceptions to Wrigley's practice and of *de minimis* value compared to its total revenues." Finding Wrigley not liable for the franchise tax, the court did not reach the penalty interest issue.

The DOR appealed. In a split decision, the court of appeals reversed. *Wrigley*, 153 Wis. 2d at 579. Although it acknowledged that the circuit court's opinion was "thoughtful, thorough and well-reasoned," the majority of the court of appeals concluded there was substantial evidence to support the Commission's order. *Id.* at 571. Additionally, in determining which activities of a company go beyond "solicitation," the court employed a pre-sale/post-sale test. *Id.* at 577. It held that solicitation included "acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers." *Id.* at 569. The court of appeals also held that "solicitation of orders" should not encompass "post-sale activities that are not closely or 'inextricably related' to the solicitation of orders." *Id.* The court concluded that Wrigley engaged in such post-sale

activities, lending evidentiary support to the Commission's order. *Id.* at 571. The court of appeals also held that Wrigley was liable for the eighteen percent delinquent penalty interest on the tax. *Id.* at 579.

Judge Dykman, in his dissent, stated that "the majority should have analyzed this case in the context of the manner by which the chewing gum industry sells its product." *Id.* at 580. Wrigley's salespeople were making the product attractive to induce customers to place an order. *Id.* Creating an attractive display is an important part of selling gum – an "impulse sale" product. *Id.* Judge Dykman stated that the sum of Wrigley's activities does not remove Wrigley from the protection of 15 U.S.C. sec. 381. *Id.* Instead, the sum of the questioned activities is *de minimis*. *Id.* at 581.

Wrigley petitioned for review, and on February 20, 1990, this court granted Wrigley's petition.

Wrigley is an Illinois corporation engaged in the business of manufacturing and selling chewing gum products. Its headquarters are in Illinois. It files tax

returns in Illinois and in eight other states in which it has sales offices, warehouses, and/or manufacturing facilities. In addition, Wrigley has been declared to be under the protection of 15 U.S.C. sec. 381 in New York and North Dakota, where it engages in activities similar to those performed in Wisconsin. (Transcript of Hearing, August 26, 1985, pp. 33-35).

Wrigley is not licensed to do business in Wisconsin; nor has it ever filed a tax return or paid taxes in Wisconsin. From 1973 to 1978, Wrigley's volume of sales in Wisconsin ranged from $2,797,055 to $4,392,202.

During the years in question, 1973 to 1978, Wrigley had few contacts with the state of Wisconsin. It did not own or lease any real estate in Wisconsin; it had no bank accounts; it did not own or operate a manufacturing or "warehouse facility;" it had no telephone listing; it did not own or operate a training facility; and it did not store inventory, other than samples carried by sales representatives.

All orders for Wrigley products were approved in Chicago. All pricing and credit transactions took place in Chicago as well. The deliveries for orders solicited by agents in Wisconsin were made from outside the state by common carrier.

Wrigley's advertisements, including television and radio spots, appeared in Wisconsin. The company also placed coupon ads in Wisconsin newspapers. All such advertising was purchased and managed through an independent advertising agency in Chicago.

From 1973 to 1978, Wrigley had several types of sales employees working in Wisconsin. The sales or "field" representatives solicited orders within a territory. The regional sales managers would oversee the field representatives in the several territories of their assigned region. They would also solicit "key" accounts within the region. Finally, the district managers were responsible for the several regions which made up their districts.

From 1973 through 1978, Wrigley employed four or five field representatives to service Wisconsin accounts.

Most of the field representatives lived in Wisconsin, and each one was supplied with a company car. Wrigley reimbursed the field representatives for gas and service expenses, business expenses, and long distance phone charges.

The field representatives were responsible for soliciting orders from approximately thirty to fifty direct accounts. A direct account is primarily a wholesaler, billed directly for products it receives from a Wrigley manufacturing facility. The field representatives were also responsible for regularly contacting between 400 and 650 indirect accounts. An indirect account is primarily a retailer that receives products from a wholesaler.

John Kroyer, a district manager during the period in question, testified that:

> Wrigley chewing gum [is] approximately a ninety-four or ninety-five percent impulse item; in other words, it's not a planned purchase. . . .[I]t's one thing that's of utmost importance that we have fresh product available to the consumer at all times. . .[E]ventually it's going to affect your sales. . . .You have to have it visible to the consumer. They will not ask for

> it. . . .So sales and merchandise goes hand in hand due to the nature of our product.

Therefore, when contacting retailers, the field representatives ensured that the retailers had adequate inventories of all brands and pack sizes of gum, permitting the retailers to effectively display and promote Wrigley products. This involved replacing stale gum with fresh gum when the product was outdated at no cost to the retailer. Gum has a "shelf life" of about six months. The stale gum was disposed in a Wisconsin landfill or sent back to Chicago by common carrier to be destroyed.

The field representatives also engaged in "agency stock checks" about once a month. This occurred when a field representative put up a new stand and stocked it with gum because the retailer did not want to wait for a wholesaler to come and fill the stand. The field representative would send a report called an "agency stock check" to the Wrigley office in Chicago. The office would then bill the wholesaler. The wholesaler would bill the account and replace the field representative's supply of product with the amount with

which the field representative stocked the account's stand. This amount was usually fifteen to twenty dollars worth of gum.

The product used for agency stock checks and exchanging stale gum for fresh gum came from the field representative's supply of gum. Each of the four or five representatives carried a supply of gum with a wholesale value of approximately $1,000, with thirty-five to forty percent of the supply being stale gum. This supply of "samples" was carried as inventory on Wrigley's books.

Another way in which the field representatives increased sales was to set up display racks for accounts. These display racks were furnished to an account free of charge. Once the display rack was set up, title to it would pass to the account. The field representatives were not required to account to Wrigley for the display racks. Wrigley did not carry the racks as inventory or fixed assets.

In 1976, after Wrigley terminated one particular field representative, the company needed a place to store the

representative's company car and supply of products until a new representative was hired. Normally, the company would store the car at a dealership, but in this instance the district manager could not locate a reasonable rental space for the car. Wrigley allowed the district manager to rent storage space in a warehouse, in his own name, for the three to four month interim until a new representative was hired. The rental cost of approximately twenty-five dollars per month was charged to the district manager's expense account.

After the new field representative was hired, he had no room to store the gum and displays in his home. Wrigley gave him permission to continue the warehouse rental for storage space. This was not Wrigley's common practice, but based on the specific facts of the situation, the company made an exception to the rule. The storage space was rented through the year 1978.

From 1973 to 1978, Wrigley employed two different individuals who served as the regional sales manager for Wisconsin. John Kroyer had this position from 1973 to

1976, and Gary Hecht was the regional sales manager from 1976 to 1978. Both of these individuals lived in Wisconsin and worked out of their home during their employment. Kroyer testified that Wrigley issued him a file cabinet for his in-home office. In addition, he declared an income tax deduction for the office in his home. Like the field representatives, the regional sales managers had a company car, and Wrigley reimbursed them for gas and service expenses, business expenses, and long distance phone charges.

The regional sales managers were responsible for increasing volumes, sales, distribution, and improving merchandising. They were also directly responsible for "key" accounts - the direct accounts which made up eighty percent of the company's total volume. Kroyer testified that eighty to eighty-five percent of his time was spent working in the field on sales activities. Administrative activities made up the other percentage of his time. Hecht, on the other hand, testified that he spent ninety to

ninety-five percent of his time in the field engaging in supervisory or managerial activities.

When a field representative vacancy arose, the regional sales manager would get permission from the Chicago office to fill the vacancy. He would then locate applicants, using an employment agency or by placing an ad in a newspaper. The regional manager would interview applicants at a coffee shop or restaurant, or sometimes at a hotel. The applicant would be hired if the district manager approved of the regional sales manager's recommendation. The regional sales manager did not have authority over a field representative's compensation, nor did he have the authority to discharge a field representative. However, regarding one particular field representative, Hecht testified: "I'm not entirely certain if I fired [him] or if he quit. I just can't remember." The regional sales managers did make recommendations to the district manager regarding the field representatives' compensation and performance, but the district manager always had the "final say" in the matter.

Once a new field representative was hired, the regional sales manager was responsible for training. From 1973 to 1978, Wrigley did not have a formal training program or a training center. Instead, the regional sales manager would instruct the new employee to accompany another top field representative in the field. So while the new employee was being trained, the field representatives were working the territory. Kroyer testified that "[a]ll the training was done in the field."

About once or twice a year, the regional sales manager would hold a sales meeting with all the field representatives of his region. Kroyer usually conducted the meetings out of his home. Hecht held the meetings at a hotel or motel. The meetings usually lasted about a full day and involved strategies to obtain greater sales. Occasionally, a sales meeting would be held in conjunction with the introduction of a new brand of gum or new packaging. The regional sales managers' other communications with the field representatives were made

by telephone, in written form, or in a one-to-one meeting, usually held at a coffee shop.

Wrigley's "position description" of the regional sales manager, dated September, 1979, states that the regional sales manager "represents the company on credit problems as necessary." When questioned about this duty, Hecht testified, "I have no idea what that refers to. It's never came up in the nine or ten years that I have been regional sales manager, and nobody has ever brought to my attention on my performance appraisals that I was neglecting one of my duties." Hecht did receive copies of correspondence from the Wrigley credit department. He did not take any action on these letters. When Kroyer received a copy of a credit letter, he would occasionally identify the credit problem and try to get the account and the credit department to communicate in order to solve the problem.

Overseeing the regional sales manager was the district manager, who was responsible for all activities that took place in his district. This included making decisions on

hiring, firing, compensation, and sales strategies. The district manager spent very little time in Wisconsin, approximately six to nine days a year. These days were spent either in the field calling on a customer, or attending a sales meeting.

Whether or not Wrigley's activities go beyond "solicitation of orders" under 15 U.S.C. sec. 381 requires the application of facts to a statute. This is a question of law. *Local No. 695 v. LIRC*, 154 Wis. 2d 75, 82, 452 N.W.2d 368 (1990). "'The black letter rule is that a court is not bound by an agency's conclusions of law.'" *Id.* (citing *West Bend Education Ass'n. v. WERC*, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984)). In some instances, however, a court will give deference to an agency's interpretation of a statute. *West Bend*, 121 Wis. 2d at 12. Section 227.57(10), Stats., (1987-88) provides that in reviewing an agency's decision "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." In addition,

"[w]hen the legislature charges an administrative agency to apply and enforce a particular statute. . .the agency's construction and interpretation of the statute are entitled to great weight and any rational basis will sustain its practical interpretations." *School Dist. of Drummond v. WERC*, 121 Wis. 2d 126, 132-133, 358 N.W.2d 285 (1984). As the court of appeals determined, sec. 73.01(4)(a), Stats. (1987-88)[4] does not specifically empower the Commission to interpret the federal statute at issue here. *Wrigley*, 153 Wis. 2d at 565. We agree with the court of appeals that the Commission's decision should not be given great weight.

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[4]Section 73.01(4)(a), Stats. (1987-88) provides in part:

> **73.01 Tax Appeals Commission. (4)(a)** Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and ss. 70.11(21), 70.38(4)(a), 70.64, 70.995(8), 72.86(4), 1985 stats., 76.38(12)(a), 76.39(4)(c), 76.48(6), 77.26(3), 77.59(6)(b), 78.22, 139.03(4), 139.315 and 139.78 and subch. XIV of ch. 71.

Further, "where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy." *West Bend*, 121 Wis. 2d at 12 (footnote omitted). The court in *West Bend* also noted that "[w]here the question is 'very nearly' one of first impression, and the agency has not developed expertise or a body of precedent on the question, the court is to give the agency's conclusion 'due weight' or 'great bearing' but not 'great weight.'" *Id.* n. 12; *see also Local 695*, 154 Wis. 2d at 83. Even though an agency may have never interpreted a particular statute against facts of first impression, because the agency has prior experience in interpreting the statute, the agency's decision will be accorded due weight or great bearing. *See Local 695*, 154 Wis. 2d at 84.

Finally, "[w]here a legal question is concerned and there is no evidence of any special expertise or experience, the weight to be afforded an agency interpretation is no

weight at all." *Id.* The scope of "solicitation" under 15 U.S.C. sec. 381(b)(1) has never been interpreted by the Commission under a set of facts similar to Wrigley's, nor under any set of facts at all. The DOR stated in its brief that "the precise scope of the statute was not at issue until its. . .decision in this case." For this reason, we review the Commission's interpretation of "solicitation" *de novo*. Additionally, we give no deference to the decisions of the circuit court and court of appeals on this question of law. *See Eby v. Kozarek*, 153 Wis. 2d 75, 79 450 N.W.2d 249 (1990).

As to the Commission's findings of fact, it stated that its "findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record." Since it is the Commission's function to determine the credibility of the witnesses and the weight of the evidence, we will affirm the Commission's findings of fact "if they are supported by substantial evidence in view of the entire record." *Muskego-Norway*

C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967).

Article 1, sec. 8, clause 3 of the United States Constitution gives Congress the power to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). This includes the power to regulate state taxation, to the extent that it affects interstate commerce. *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 904, 910 (M.D. Tenn. 1981). On September 14, 1959, Congress exercised this power when it enacted Public Law 86-272, codified in 15 U.S.C. sec. 381. The law prohibits a state from taxing income derived from interstate commerce if the only activities of the out-of-state person within the state are the solicitation of orders sent outside the state for approval and shipment. "Hence, the immunity provisions. . .are not available if, for example, the out-of-state company maintains a warehouse or a stock of goods within the State." S.Rep. No. 658, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Admin. News 2548, 2554. 15 U.S.C. 381 does not define

which activities are included in "solicitation of orders." Further, the one instance in which the United States Supreme Court addressed the application of the statute, it did not define the scope of "solicitation of orders." *See Heublein, Inc. v. South Carolina Tax Comm'n.*, 409 U.S. 275 (1972). "We need not decide whether, as the State urges, the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term 'solicitation.'" *Id.* at 278.

Since the statute does not define the meaning nor the scope of "solicitation of orders," we turn to the legislative history of 15 U.S.C. sec. 381 to determine its effect and purpose. *See Labor & Farm Party v. Elections Board.*, 117 Wis. 2d 351, 355-356, 344 N.W.2d 177 (1984). Citing *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W. 2d 557 (1971), the DOR contends that "the legislative history of the act clearly indicates that a narrow construction of the term 'solicitation of orders' was intended by Congress." *Id.*

at 562 (citing 2 U.S. Code Cong. & Adm. News 2548 et. seq. (9th Cong., First Session, 1959). The court in *Hervey* does not specifically identify any language in the legislative history which leads it to this conclusion.

We fail to see how the legislative history "clearly indicates" a narrow construction of "solicitation of orders." According to Senate Report No. 658, in support of 15 U.S.C. sec. 381, the statute was meant to

> deal with the problem arising by reason of a recent decision of the U.S. Supreme Court in Northwestern States Portland Cement Co. v. State of Minnesota and T.V. Williams, Commissioner v. Stockham Valves & Fittings, Inc. (79 S.Ct. 357, 358 U.S. 450 3 L.Ed.2d 421 (1959).
>
> Your committee finds that the broad language used by the Supreme Court in its decision in these cases-
>
> > We conclude that net income from the interstate operations of a foreign corporation may be subjected to State taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State *forming sufficient nexus to support the same*. (358 U.S. 450 at 452).
>
> has created considerable concern and uncertainty. (Emphasis supplied.) . . .

> This apprehension is apparently strengthened by the decision of the Louisiana Supreme Court in the Brown-Forman case, which the U.S. Supreme Court refused to review. There the activities of the corporation within the State were apparently limited to the presence of 'missionary men' engaged in solicitation. (footnotes omitted).

S. Rep. No. 658, 2549. In *Northwestern States*, the court upheld a Minnesota Tax on the income of an Iowa cement manufacturer who sent salespeople into Minnesota to solicit orders and to encourage orders from cement users ordering from local wholesalers. 358 U.S. at 454-455. The company also maintained a sales office in Minnesota. *Id.* at 454.

In *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70, 72 (1958), *cert. dismissed*, 350 U.S. 28 (1959), the court refused to disturb the ruling which allowed the state of Louisiana to tax a Kentucky whisky company. The company's "missionary men" called on wholesalers and also assisted salespeople in obtaining suitable displays for retailers in Louisiana. *Id.* at 70.

This apprehension created by *Northwestern States* and *Brown-Forman* was due to the burden placed on companies attempting to ascertain, with respect to every state in which sales were made, the company's taxable income, and the portion of that income "properly apportioned" to the taxing state. S. Rep. No. 658 at 2549-2550. Moreover, each of the states which were taxing business income were using "different definitions and different formulas - thus guaranteeing major compliance headaches for all businesses crossing state lines." *State Taxation of Interstate Commerce: Hearing Before the Committee of Finance*, 86th Cong., First Sess. 4 (1959) (Statement of Sen. John Sparkman).

The Committees studying the legislation concluded that "the uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets and the deprivation of consumer goods and services to the detriment of the American economy." *International Shoe Co. v. Cocreham*,

246 La. 244, 164 So.2d 314, 321, *cert. denied*. 379 U.S. 902 (1964) (citing State & Local Tax Report No. 122, sec. 2, page 4). To relieve this undue burden on interstate commerce, Congress enacted P.L. 86-272, which takes a "'minimum activities' type of approach" in determining when a company is subject to a state's income tax. S. Rep. No. 658 at 2548. "Section 381 was designed to define clearly a lower limit for the exercise of that power [a state's power to tax]. Clarity that would remove uncertainty was Congress' primary goal." *Heublein*, 409 U.S. at 280.

States have not been uniform in interpreting the meaning of "solicitation of orders." The DOR cites as compelling *National Tires, Inc. v. Lindley*, 68 Ohio App. 2d 71, 793, 426 N.E.2d (1980) and *Clairol, Inc. v. Kinsley*, 262 A.2d 213, (N.J. 1970), *cert. dismissed*, 402 U.S. 902 (1971) (dismissed for want of a substantial federal question), two cases which narrowly interpret "solicitation of orders."

In *National Tires*, the appellant, National Tires, "constantly upgraded stock, maintained current inventories, removed old, defective products and ensured

proper credit for them, advised sellers on methods to improve their inventory, negotiated sales between jobbers and dealers, completely changed over competitive products to the Modac line - in short, appellant helped run these businesses in Ohio." 426 N.E.2d at 798. The court found that these activities enabled National Tires to "assume control over its Ohio operations." *Id.* Thus, National Tires' business in Ohio involved "'something more than solicitation.'" *Id.*

In *Clairol*, Clairol sold products to salon wholesalers and had "detail people" having a "technical background" call on beauty salons. 262 A.2d at 217; *see also*, *Ringgold Coal Mining Company v. Taxation Division Director*. They did "very little as far as order taking." *Clairol*, 262 A.2d at 217. The court held that "Clairol's business activities in New Jersey extend beyond the mere solicitation of orders either on its own behalf or on behalf of its wholesalers." *Id.* at 217-218.

The courts in *National Tires* and *Clairol* did not define solicitation. They merely concluded that the activities in

those cases exceeded solicitation. Moreover, in *National Tires*, the company was actually assisting in the operation of the business of its customers. Since Wrigley's activities are not similar to those of *National Tires* or *Clairol*, we do not find either case persuasive.

The DOR cites a number of other cases where courts have found no protection under 15 U.S.C. sec. 381 for various types of businesses, *i.e.*, *National Tires* and *Clairol*. Most of these cases are distinguishable on their facts. Others represent an approach to 15 U.S.C. sec. 381 that we conclude is repugnant to the intent of Congress in passing the legislation. *See United States Tobacco Co. v. Martin*, 304 Ark. 119, 199 Ark. LEXIS 598 (December 17, 1990) (J. Turner, dissenting).

Finally, the DOR cites tribunals which have interpreted solicitation to include only those activities leading to the placement of orders. *See, e.g., Drackett Products Co. v. Conrad*, 370 N.W.2d 723, 726 (N.D. 1985); *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (274 Or. 395 (1976); *In the Matter of Raymond*

E. Campbell & Associates, Ltd., Iowa Department of Revenue and Finance, Iowa Tax Rptr. (CCH) secs. 200-483 (1988). The court of appeals adopted a similar interpretation of solicitation. *Wrigley*, 153 Wis. 2d at 569. "[I]t [solicitation] should not include those acts which follow as a natural result of the transaction . . . ." *Id.*

Although the pre-sale/post-sale test may produce consistency and predictability, the test places all the emphasis on *when* the activity occurred. It fails to take into account the *nature* of a company's activities. As Wrigley points out, post-sale activities may share the same qualities and purposes as pre-sale activities: encouraging future orders.

In interpreting "solicitation of orders" under 15 U.S.C. sec. 381, we follow "the well-established rule of statutory construction that nontechnical words and phrases are to be construed according to their common and ordinary usage." *State ex rel. B'nai B'rith F. v. Walworth County*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973). Further, "'[t]he popular

or reasonable import of words furnishes the general rule for the interpretation of public laws.'" *Id.* (quoting *State Bank of Drummond v. Nuesse*, 13 Wis. 2d 74, 78, 108 N.W.2d 384 (1961).

To solicit is "to approach with a request or plea (as in selling or begging)." *Webster's Third New International Dictionary of the English Language*, p. 2169 (unabridged) (1961). We agree with the Pennsylvania court in *United States Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, 478, *cert. denied*, 439 U.S. 880 (1978), that the definition of solicitation not only encompasses a "sales pitch," but it also includes activities incidental to the initial contact between the buyer and the seller:

> When Congress enacts legislation exempting 'solicitation' by an interstate corporation from a state's net income tax, and does so in response to a case where the 'solicitation' involved activity [Brown-Forman] incidental to the initial contact between seller and prospective buyer, we as state courts are bound to give foreign corporations sec. 381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree.

Id.

In *United States Tobacco*, the Pennsylvania court held that the United States Tobacco Company was protected under 15 U.S.C. sec. 381, and therefore did not have to pay corporate income tax in that state. 386 A.2d 479. The company employed representatives who called on various retail outlets. *Id.* at 472. These representatives carried samples of new products, purchased from a wholesaler. *Id.* If a retailer purchased some samples, the retailer paid the representative the same amount the representative paid the wholesaler for the samples. *Id.* United States Tobacco's representatives also made sure the company's products were fresh and attractively displayed. *Id.* They also set up counter displays and sometimes gave retailers free samples of tobacco products in exchange for more extensive counter space. *Id.* The court stated:

> [W]e have said that acts of courtesy performed by business solicitors, in order to satisfy or accommodate customers, did not go beyond solicitation; nor was it relevant that the solicitors were provided facilities to carry on their solicitations (citations omitted). The import of these decisions is that 'solicitation' does not stop at the moment a prospective customer [or wholesaler] is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate consumer, also fall under the rubric 'solicitation.'

Id. at 478. Like Wrigley's activities in Wisconsin, all of United States Tobacco's activities "were a kind of solicitation activity - as much so as the exchanging of friendly amenities between a solicitor and the potential customer." *Id.*

In a similar case, *Gillette Co. v. Tax Comm.*, 56 A.D.2d 475, 481, 393 N.Y.S. 2d 186 (1977), the New York Tax Commission claimed that Gillette's activities went beyond "solicitation" of orders in that state. Gillette manufactures and sells personal care products. *Id.* at 477. It employed salespeople who called on indirect accounts in New York and told the accounts about changes in products and promotions. *Id.* at 478. The salespeople also reviewed the account's display of Gillette products to ensure that the products were attractively displayed and in saleable

condition. In annulling the franchise tax against Gillette, the New York court stated:

> Although it is not possible to state a general rule demarcating solicitation from merchandising, certainly where, as here, the complaining taxpayer owns no real or personal property [except salesmen's samples] in the state and makes no repairs on its goods after sale, the purpose of Public Law 86-272 would be frustrated by permitting the tax. Advice to retailers on the art of displaying goods to the public can hardly be more thoroughly solicitation, i.e., in this contest, an effort to induce purchase of Gillette products.

Id. at 482.

It is important to note that the New York State Tax Commission, relying on *Gillette, United States Tobacco*, and a New York revenue ruling, has recently determined that Wrigley is entitled to a refund for New York franchise taxes it paid for the years 1975 through 1980. *In the Matter of the Petition of William Wrigley, Jr. Company*, State Tax Comm'n. (March 11, 1987). Wrigley's activities in New York were nearly identical to its activities in Wisconsin:

> 15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the

> representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both saleable and unsaleable product and had negligible value.
>
> 16. On occasion, a sales representative replaced either out-of-date or undisplayed product with stock in an indirect account's storage area.
>
> 17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. The stands were purchased from suppliers throughout the United States and were often shipped directly to a customer. . . .In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

Id. In interpreting solicitation to include "some activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property," the Commission found that Wrigley's activities

in New York constituted "solicitation" within the meaning of 15 U.S.C. sec. 381. *Id.*

The Commission, in its decision in the case before us, determined that Wrigley engaged in the following activities in Wisconsin which, taken together, exceeded "solicitation of orders."

- replacement of stale gum
- maintaining product displays both as to location design and content
- direct sales of gum by use of 'agency stock checks'
- maintaining offices in home
- conducting regular and periodic training seminars in Wisconsin
- recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
- involvement in credit transactions by regional manager
- training and supervising sales representatives by regional sales manager
- rental of storage space in Madison, Wisconsin
- the purchase of non-incidental advertising in Wisconsin

Earlier in this opinion, we have set forth in detail the testimony from which this list of summarized activities derives.

In the context of the facts in this case and considering the nature of the chewing gum business, as did Judge Dykman in his dissent, we hold that each of Wrigley's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum. Any activities described here that could be considered as somehow not being inextricably bound up in solicitation, such as the rare occasions when credit problems were looked into, are so minor as to be *de minimis*. Certainly we do not think they could be of sufficient weight in the flow on interstate commerce as to remove Wrigley from the protection of 15 U.S.C. sec. 381.

When analyzing a claimed immunity under 15 U.S.C. sec. 381, a court should look at whether the activities are closely associated and inextricably bound up with "solicitation of orders." The mere fact that these orders may be future orders does not necessarily result in loss of

immunity. Courts should also analyze what is alleged to be "deviations from the norm" and *de minimis* activities. As in the case before us, such activities do not reach a level of activity resulting in loss of immunity. Further, the court should consider activities that are *not* performed, with special reference to Congress' examples of non-immune activities in a state: maintaining a warehouse or a stock of goods. S.Rep. No. 658 at 2554. Not only what is done, but what is *not done* in a state bears on the question of whether activities are "solicitation of orders." Finally, the court must consider the type of business involved, and the manner in which products are sold and orders are solicited -- such as the sale of gum in the case before us, and the sale of tobacco products in *United States Tobacco*.

As the testimony revealed, gum is an "impulse item." In order to sell, it must be fresh and attractively displayed. Replacing stale gum and maintaining product displays are an important part of obtaining more orders for gum. Moreover, these activities are not "sales." The fresh gum and displays were supplied to customers free of charge.

Nor are the "agency stock checks" sales: The field representative never negotiated a price for the gum, never billed the account, and never accepted money for the gum.[5]

As for the regional sales manager's activities, they were part of effectively managing the solicitation of orders. As such, these activities were incidental to the solicitation of orders.

The rental storage space is certainly not the type of warehouse Congress envisioned when it referred to a company losing immunity under 25 U.S.C. sec. 381 for

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[5]In his dissenting opinion to the Commission's Order, Commissioner Douglass Bartley commented on the *de minimis* value of the "agency stock checks," which he referred to as "direct sales."

> Although there is no question that the sales were direct, I conclude that such sales can only be characterized as unusual and infrequent because they were but a pittance. For example in 1978, direct sales amounted to at most $600, or 7/100,000 of one per cent of Wrigley's $4,392,202 of Wisconsin sales that year. Looking at this in a slightly different perspective, direct sales of Wrigley's gum were barely enough to supply three avid, two-pack-a-day chewers with enough Juicy Fruit to last through the year. That's not enough gum to stick jurisdiction on Wrigley even if the chewers are doubling their pleasure.

maintaining a warehouse. *See* S. Rep. No. 657 at 255. The space was rented for several months to store a representative's company car and supplies. It does not approach the size or type of warehouse needed to store inventory in order to supply the wholesalers and retailers in this state. At the most, it was a minor and *de minimis* deviation from the usual practice.

Regarding the advertising, it too is an important part of soliciting orders. As a medium to alert potential customers of the existence and availability of a company's product, the appearance of Wrigley's ads in Wisconsin are incidental to solicitation of orders for the product.

We would hardly expect Wrigley to cross the state line any time it must engage in activities incidental to placing an order for gum. This would surely be a burden on interstate commerce and would "tend to 'balkanize the American economy,' a result which it was Congress' purpose to prevent." *Gillette Co. v. Tax Comm.*, 56 A.D.2d at 482.

We conclude that Wrigley's activities in Wisconsin did not go beyond the "solicitation of orders" as that term is used in 15 U.S.C. sec. 381. Therefore, the DOR may not assess and collect a tax on Wrigley's net income for the years 1973 to 1978.

By the court:--The decision of the court of appeals is reversed.

No. 88-2265

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

WILLIAM WRIGLEY, JR., CO.,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Appellant.

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Appellant,

v.

WILLIAM WRIGLEY, JR., CO.,

Respondent.

APPEAL from an order of the circuit court for Dane county: MARTHA J. BABLITCH, Reserve Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. The Wisconsin Department of Revenue appeals from a judgment reversing a decision of the Tax Appeals Commission. The commission upheld a franchise tax assessment against the William Wrigley, Jr., Company, an Illinois manufacturer of chewing gum which markets its products in Wisconsin and other states. The department assessed taxes and delinquent interest for the years 1973 through 1978, and Wrigley appealed to the commission on grounds that the assessment was prohibited by federal law. The commission upheld the assessment, but ruled that the department had applied an improper rate of interest. On review, the circuit court reversed and the department appealed.

The issues are: (1) whether the assessment is barred by the provisions of 15 U.S.C. sec. 381, which allow state taxation of income from interstate commerce only if the company's business activity within the state is confined to the "solicitation of [sales] orders"; and (2) if not, whether the assessed taxes were "delinquent" within the meaning of sec. 71.10(9), Stats. (1985-86), so as to justify

application of an eighteen percent (1.5 percent per month) interest rate on the balance due. The trial court, voiding the assessment, did not reach the question of the proper interest rate. An ancillary issue concerns the scope of our review -- whether we owe any deference to the commission's interpretation of a federal law.

We conclude that while we owe no deference to the commission in this instance, it nonetheless correctly determined that the assessment was not barred by federal law. We also conclude that the department applied the correct rate of interest. We therefore reverse the judgment of the trial court and remand with directions to enter an order affirming the commission's decision on the validity of the assessment and reversing its determination on the appropriate rate of interest to be applied to the assessment.

I. SCOPE OF REVIEW

The parties agree, as did the trial court, that the primary issue is the interpretation of 15 U.S.C.

sec. 381 -- particularly the scope and meaning of the term "solicitation of orders."

We employ different standards for reviewing the findings of fact and conclusions of law of administrative agencies. The agency's factual findings will be upheld if supported by substantial evidence in the record. Sec. 227.57(6), Stats. The construction of a statute, however, is a question of law. Generally, we decide such questions independently, owing no deference to the trial court or, in this case, to the administrative agency. *In Interest of C.A.K.*, 147 Wis. 2d 713, 715, 433 N.W.2d 298, 299 (Ct. App. 1988).

Exceptions are made, however, for agencies' interpretations of statutes they are charged by the legislature to administer and enforce. In such situations the agency's interpretation of the statute is entitled to great weight if it reflects a practice or position long continued, substantially uniform and without challenge by governmental authorities and courts. *School Dist. of Drummond v. WERC*, 121 Wis. 2d 126, 132-33, 358

N.W.2d 285, 288-89 (1984). In such cases, we will sustain the agency's interpretation if it has any rational basis. *Id.*

Even where the higher "great weight" standard of deference is inapplicable, courts will accord "due deference" to an agency's application of the law to found facts when the agency has particular competence or expertise in the matter at hand. *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855, 857 (1977), or where the decision is intertwined with value and policy judgments appropriate to the agency's administration of the law. *Transp. Dept. v. Transp. Com'r*, 135 Wis. 2d 195, 199, 400 N.W.2d 15, 16 (Ct. App. 1986). But no such deference is required where the courts are as competent as the agency to decide the question presented. *Milwaukee Refining Corp.*, 80 Wis. 2d at 48, 257 N.W.2d at 858.

Under more usual circumstances, we would accord some deference to the commission's decision in this case, based as it is on the interpretation of a law in a field in which it has expertise. Here, however, the statute subject to interpretation is an act of Congress, not a law created by

the Wisconsin Legislature. Like all administrative agencies, the commission was created, structured and empowered by the legislature for the primary purpose of "determin[ing] . . . all questions of law and fact arising under [specified provisions of the Wisconsin Statutes]." Sec. 73.01(4)(a), Stats. But whatever deference may be appropriate to the interpretation of particular sections of the Wisconsin Statutes by an agency created by the Wisconsin Legislature to do just that, we fail to see how or why similar deference should be accorded to the agency's interpretation of federal law.

The department responds with a brief reference to two cases, both cited for the proposition that deference must be paid in such a situation: *Tecumseh Products Co. v. Wisconsin E.R. Board*, 23 Wis. 2d 118, 127-29, 126 N.W.2d 520, 524-25 (1964), and *Milwaukee v. ILHR Department*, 106 Wis. 2d 254, 257-59, 316 N.W.2d 367, 369-70 (1982). We do not read either case as so holding. *Tecumseh Products* involved the Wisconsin Employment Relations Board's interpretation of the word "job" in a collective

bargaining agreement, and the court appropriately paid deference to the board's expertise in construing such agreements. The *Tecumseh Products* court's reference to "federal law" had nothing to do with the scope of review of the agency's interpretation. It was simply a statement in another section of the opinion that the board "ha[d] jurisdiction to apply federal common law of collective-bargaining agreements in resolution of disputes under [Wisconsin] Stat[utes]." *Id.*, 23 Wis. 2d at 129, 126 N.W.2d at 525.

The reference to *Milwaukee v. ILHR Dept.*, is similarly unavailing, for there the court's reference to the deference to be accorded the agency's interpretation referred to its interpretation of a Wisconsin statute. *Id.*, 106 Wis. 2d at 257, 316 N.W.2d at 369. The reference to "federal law" was only to illustrate the statute's conformity with federal statutes. *Id.*, 106 Wis. 2d at 259, 316 N.W.2d at 369-70.

We conclude, therefore, that whatever deference courts may owe to a state agency's expertise and function when it interprets acts of the Wisconsin Legislature, no such

deference is owed when the agency is interpreting statutes or rules of the federal government.

II. 15 U.S.C. Sec. 381 AS A BAR TO THE ASSESSMENT

The commission, after discussing the facts of Wrigley's business activities within the state, concluded that 15 U.S.C. sec. 381 did not prohibit assessment of Wisconsin franchise taxes to the company because its Wisconsin activities comprised more than the mere "solicitation of orders" within the meaning of the law. In so deciding, it adopted and applied a set of guidelines prepared by the Multistate Tax Commission (MTC), an association of state revenue officials, to the facts of Wrigley's activities in Wisconsin. The parties spend considerable time arguing the propriety of the commission's use of such extralegal "guidelines" as the benchmark for its decision here. While we share Wrigley's concern that the commission may have exceeded its authority by doing so, because we review its

conclusions *de novo* we need not decide the propriety of the commission's use of the MTC materials.

It is generally accepted that 15 U.S.C. sec. 381 was enacted in response to the decision of the United States Supreme Court in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and its denial of certiorari in *Brown-Forman Distill. Corp. v. Collector of Revenue*, 101 So.2d 70 (La. 1958), *cert. denied*, 359 U.S. 28 (1959).

In those cases the Court upheld state taxation of the income of multistate businesses with little activity in the taxing states other than the presence of sales offices (*Northwestern*) and so-called "missionary men" who solicited local wholesalers and sometimes assisted them in obtaining product display paraphernalia for use in retail stores (*Brown-Forman*). According to reports accompanying the bill that became 15 U.S.C. sec. 381, these decisions prompted "serious apprehension" in the commercial community that mere solicitation activities by multistate businesses would subject them to multiple state

taxation. *U.S. Tobacco Co. v. Com.*, 386 A.2d 471, 474 (Pa.), *cert. denied*, 439 U.S. 880 (1978), citing S. Rep. No. 658, 86th Cong., 1st Sess. 2, *reprinted* in 1959 U.S. Code Cong. & Admin. News 2548. Thus, 15 U.S.C. sec. 381 was the congressional response to *Northwestern States* and *Brown-Forman* -- a law passed to "allay the fear that 'mere solicitation' would subject interstate businesses to multiple state taxation." *Tobacco Co.*, 386 A.2d at 474.

Courts in other jurisdictions considering the language of 15 U.S.C. sec. 381 have varied in their interpretations of the "solicitation" provisions of the law. The narrowest view, that obtaining in New Jersey and Arkansas, among other states, is that "solicitation of business" must be strictly limited to the specific task of asking a customer to purchase one's product. *Clairol, Incorporated v. Kingsley*, 262 A.2d 213, 217-18 (N.J. Super. Ct. App. Div.), *aff'd*, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972). Under this view, the taxpayer must "bring itself within the statute [by showing] that the *only* business activity on its behalf in [the taxing state] was the solicitation of orders

[for sales of tangible personal property]." *Hervey v. AMF Beaird, Inc.*, 464 S.W.2d 557, 561-62 (Ark. 1971) (emphasis in original).

A slightly more liberal view -- really a middle ground -- is that held by, among others, the Oregon court: that is, that "solicitation" also includes those generally accepted or customary acts in the industry which lead to the placing of orders. *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (Or. 1976).

The broadest position finds favor in Pennsylvania and New York. The Pennsylvania Supreme Court, in *Tobacco Co.*, 386 A.2d at 478, held that permissible "solicitation" under 15 U.S.C. sec. 381 included "sundry activities so long as those activities [are] closely related to the eventual sale of a product" -- activities that are "incident to soliciting," whether they lead up to the sale or follow it.

Our reading of 15 U.S.C. sec. 381 in light of the facts underlying its enactment and the views of state courts that have considered it leads us to conclude that it was intended, in the words of *Miles Laboratories*, to exempt not

only the actual solicitation of orders as that term is commonly understood, but also those acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers. We agree with the Pennsylvania Supreme Court that, while the Senate Report supports a relatively narrow construction of the term "solicitation," it must reasonably include activities beyond a simple sales pitch -- something more than merely "send[ing] salespeople into another state who leave brochures describing their employer's products, hoping the prospective customer will then take the initiative to contact the employer for possible sale." *Tobacco Co.*, 386 A.2d at 478. The concept must include other activities so long as they are closely or "inextricably" related to the eventual sale of the product. *Id.* Thus, presale activities such as "visiting retail outlets, introducing new products, and advising retailers on making attractive displays of . . . products" should not, by themselves, subject the company to taxation. *Id.*

However, we do not believe that "solicitation of orders" should encompass post-sale activities that are not closely or "inextricably related" to the solicitation of orders. Thus, it should not include those acts which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training, and similar activities. *Miles Laboratories*, 546 P.2d at 1083.

The application of 15 U.S.C. sec. 381 to a particular interstate business is, of necessity, a case-by-case determination based on the facts establishing the "nexus" -- or lack of it -- between the company's activities and the taxing state.

In the opinion accompanying its order, the commission determined that Wrigley employees carried on the following "non-immune" activities within the State of Wisconsin during the years in question: (1) replacing stale gum; (2) maintaining product displays both as to location, design and content; (3) direct sales of gum through "agency stock checks"; (4) maintaining offices in home; (5) conducting regular and periodic training seminars;

(6) recommending hiring, firing and salary increases for sales representatives; (7) involvement in credit transactions;[1] (8) training and supervision of sales representatives; (9) rental of storage space; and (10) purchase of "nonincidental" advertising in Wisconsin. The commission concluded that, taken together, these were "considerable activities" within the state which "transcended the solicitation of orders protected by [15 U.S.C. sec. 381]."

Examining the commission's findings, the circuit court concluded that there was no evidence that "regular and periodic" training seminars were held in Wisconsin. The court then discussed "qualif[ying]" evidence relating to

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[1]When the case was initially appealed to the circuit court, the court noted that the commission's finding regarding the regional sales managers' participation in credit decisions was unclear. On remand, the commission clarified the finding. In the years in question -- 1973 through 1978 -- Wrigley had two different managers for Wisconsin, one from 1973 to 1975, and another from 1976 on. The commission, noting that the company's job description for the position called for the regional manager's participation in credit transactions, stated that only the 1973-75 manager did so, and, further, that its decision was not grounded on that fact alone, but on the "totality" of the company's activities.

several of the remaining findings and concluded that none of the company's activities went beyond those that are "necessarily incident to the efficient practice of soliciting orders in fields remote from headquarters," and thus did not transcend "solicitation," as that term is used in 15 U.S.C. sec. 381. Wrigley advances the same position on appeal -- that the commission's findings lack evidentiary support.

As we have said, we review the commission's decision independently, owing no deference to the trial court's determination. And while the trial court's decision in this case was thoughtful, thorough and well-reasoned, we take a different view of the evidence. Our own reading of the record leads us to conclude that there is substantial evidence to support the commission's order.

The substantial evidence rule is not a preponderance-of-the-evidence test, but an inquiry into whether reasonable minds could arrive at the same conclusion reached by the commission. *Farmers Mill of Athens, Inc. v. ILHR Dept.*, 97 Wis. 2d 576, 579, 294

N.W.2d 39, 41 (Ct. App. 1980). The fact that the evidence is in conflict is not grounds for reversal, for it is the commission's function, not ours, to weigh and determine the credibility of, and to draw inferences from, the evidence. *Id.* at 580, 294 N.W.2d at 41. We note also that, when one or more inferences reasonably may be drawn from the evidence, the choice of inferences is an act of fact-finding, and the inference drawn by the agency is conclusive. *Id.* And when we review an agency's decision, our task is to search for evidence to support that decision, not for evidence which would support a different or contrary result. *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 194, 349 N.W.2d 68, 79-80 (1984); *Hawes v. Germantown Mutual Ins. Co.*, 103 Wis. 2d 524, 543, 309 N.W.2d 356, 364 (Ct. App. 1981).

Taking the commission's findings *seriatim*, we believe there is ample evidence to support its initial determination that Wrigley's Wisconsin sales representatives maintained product displays and replaced stale or outdated products at various retail outlets throughout the state. Richard

Radosevic, former Wisconsin sales representative, testified that he would carry about $1,000 worth of gum and other products with him on his rounds, along with forty to seventy-five cases of "display racks [and related] equipment." He would check stores' existing supplies of gum for "outdatedness" and would "exchange . . . stale product for fresh products," destroying the stale gum. According to Radosevic, he set up and placed display racks in stores on a "daily" basis.

The commission also found that the sales representatives made direct sales of gum to retailers through what was known as "agency stock checks." Radosevic testified that sometimes -- perhaps once a month -- when he was setting up and placing a display rack for a retailer he would fill the rack with gum and would bill the wholesaler for the products left in the store, and the wholesaler would then bill the retailer. The papers prepared to arrange these billings were known as "agency stock checks."

The evidence in support of the commission's findings that Wrigley personnel conducted "regular and periodic training seminars" in Wisconsin and otherwise trained and supervised the field representatives may be found in the testimony of the company's district manager, John Kroyer, and that of Gary Hecht, the regional manager. According to Kroyer, each new sales representative was trained "in the field," under the direction of the regional manager, for a period of about four weeks before going out on his or her own. In addition, in the years in question (1973-76) Kroyer "occasionally" conducted meetings with his Wisconsin "sales force." He stated that in the three-year period such meetings "probably averaged one a year . . . ." They were held either in Kroyer's home or in a motel or hotel. He described them "sales meetings" where the participants discussed "mainly sales strategy . . . how we could get additional volume, how we could improve content merchandising . . . how we could get greater sales." Kroyer would also meet with various sales representatives individually, "generally [in] a coffee shop," to discuss "sales

and potential sales and maybe whether we were going in the wrong direction with an account, methods to improve those communications." He testified that one of his responsibilities was to check to see how the sales representatives were performing -- how they were "grasping the job," whether they had any "weaknesses," whether they were "taking advantage of merchandising opportunities," and similar matters. He also acknowledged that he was the sales representatives' "immediate supervisor" and that, as such, he "basically determined the[ir] day-to-day activities."

Hecht testified that it was his practice to conduct day-long group meetings with Wisconsin representatives once or twice a year, usually in a hotel. The purpose of the meetings, according to Hecht, was to "communicate" with the representatives on the company's "major thrust[s] or objective[s] such as the introduction of a new brand or a new packaging . . . ." Hecht also described his supervision of the sales representatives, including "periodic" evaluations of their sales presentations and other aspects

of their work, assigning specific duties to them, re-drawing sales territories and similar activities. In addition, Richard Radosevic, in his capacity as one of Wrigley's "key account sales managers" attended at least one meeting of Wisconsin sales representatives in order to "go over various company goals and objectives."

The finding that Wrigley's Wisconsin managers recommended the hiring, firing and salary increases for sales representatives is also supported by the testimony of John Kroyer. Kroyer acknowledged that he had "hired" at least one field representative during his three-year term as Wrigley's regional manager in Wisconsin. While he stated that he did not have the "final say" in hirings, he acknowledged that when a vacancy occurred, he "handled the process of locating an applicant and interviewing him." He would then make the "final selection" and communicate his "recommendation" to the company's district manager in Chicago for approval. Kroyer also described how he once "fired" a sales representative -- calling it "a rather spontaneous on the spot dismissal," although he again

stated that the "ultimate decision [resided] with the district manager." When asked about his own role in the process, however, Kroyer said simply: "I terminated him [for poor job performance.]" He stated that before he did so he had told his supervisor that "if I found what I thought I'd find" in investigating the representative's performance, "I was going to dismiss [the employee], and he [the manager] agreed." Finally, Kroyer acknowledged that he would make recommendations for pay raises for sales representatives under his direction. Here, too, Kroyer's superior, the district manager, had the final "say" in the matter.

The commission also found that Wrigley's Wisconsin personnel had been "involved" in customer credit matters. This finding also has support in the record. Kroyer testified that, in his capacity as regional manager, he would occasionally "get involved" with "credit problems" involving Wisconsin accounts. Wrigley's Chicago office would provide Kroyer and other regional managers with copies of letters sent to customers with credit problems in

the various managers' territories. When Kroyer felt that the company was getting "nasty" with a good account in his area, he would "intercede" in the matter in an attempt to resolve the dispute. Sometimes Kroyer would "take [disputes] to [Wrigley's] credit department on behalf of the account to see if we couldn't get some shipments made." He stated that he saw his job as being "kind of a mediator" in such situations, and that he would engage in these activities "probably a couple, three times a year."

There was also evidence supporting the commission's finding that, on one occasion at least, Wrigley rented storage space in Wisconsin. When Kroyer terminated an employee in 1973, he rented space in a Madison warehouse to store the company car, cases of gum, display materials and similar goods. He was reimbursed by Wrigley for the rental expenses. When the replacement was hired, the new person continued to rent the warehouse space and the lease was still in effect three years later when Kroyer left the area to take another position. Finally, we note extensive discussion in the record relating to Wrigley's

advertising efforts, both in Wisconsin and elsewhere, including Wisconsin ads on radio, television and "coupon" ads in state newspapers.[2]

In addition, there was evidence that Kroyer maintained an office in his home in Wisconsin, using at least some company-furnished equipment. He was not reimbursed for any office expenses other than the telephone bills, but he did take a home/office deduction on his income taxes. He maintained the office to aid him in "coordinat[ing] the sales activities and keep[ing] my thumb on top of all regional activities."

There is, as we have said, other evidence which may be read to contradict some of the testimony referred to above. But, as we have also said, our task is not to look for evidence to support a decision the agency could have, but did not, make -- nor even to weigh the evidence; it is

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[2]The department does not explain how such advertising exceeds the "solicitation of orders" limitation in 15 U.S.C. sec. 381, and we do not rely on it on this appeal. Even without such a finding, there is ample evidence to support the commission's ultimate determination.

simply to determine whether there is substantial evidence to support the decision made. The testimony just discussed leads us to answer that question in the affirmative.

The inquiry then becomes whether the found facts support the conclusion that Wrigley's Wisconsin activities go beyond the solicitation of orders, as that term appears in 15 U.S.C. sec. 381, and as we have interpreted it in this opinion. Again, we believe that they do. While the rental of space and the intervention in credit matters may not have been regular duties of Wisconsin representatives, the warehouse rental continued for a period of years and Kroyer's self-described "involve[ment]" in matters relating to customer credit occurred on at least a semi-regular basis -- at least two or three times a year. So, too, the setting up of displays, by itself, would not and should not subject Wrigley to state taxation. These activities, however, must be considered in light of the other evidence of Wrigley's "presence" in Wisconsin, which the testimony indicated were many and varied. In addition to those just mentioned, Wrigley personnel were engaged in: conducting

both "occasional" and semiannual sales meetings; operating month-long field training programs for new employees; providing representatives with individual $1,000 product inventories, some of which would be used by the representatives to stock store display racks on a regular basis, whereupon the retailer would be billed through an "agency stock check" procedure; and maintaining direct supervisory control over individual representatives, which supervision included not only the representatives' daily work, but also most of the hiring, firing and salary-setting activities.

The peculiar facts of this case, then, lead us to conclude that Wrigley was engaged in something more than the solicitation of orders in the State of Wisconsin in the years in question, for they include acts that go beyond those that are inextricably related to such solicitation and generally considered to lead to, rather than follow, the placing of orders. Wrigley's Wisconsin employees were not just "missionaries." They were hirers, firers, meeting organizers, trainers, customer credit "intervenors" or

"mediators," renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers. We conclude that 15 U.S.C. sec. 381 did not bar the State of Wisconsin from subjecting Wrigley to its franchise tax.

III. THE INTEREST PENALTY

The Department of Revenue imposed interest of 1.5 percent per month on the taxes assessed to Wrigley. The percentage is that applicable to "delinquent" income and franchise taxes under sec. 71.13(1)(a), Stats. (1985-86), which provides that "[i]ncome and franchise taxes shall become delinquent if not paid when due . . . and when delinquent shall be subject to interest at the rate of 1.5% per month until paid . . . ."

The commission disagreed, holding instead that sec. 71.13(2), Stats. (1985-86), applied. That section states that "[a]ny *additional* income or franchise *tax assessment* contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall

become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive." (Emphasis added.)

Concluding that the assessment represented "additional taxes" which could not become "delinquent" until at least thirty days after a final decision in Wrigley's action contesting the tax -- the commission ruled that the so-called "penalty" interest provisions of sec. 71.13(1)(a), Stats. (1985-86), were inapplicable, and that interest could not exceed the legal rate.

The department, pointing to sec. 71.10(9)(a), Stats. (1985-86), which states that corporate income and franchise taxes are "deemed delinquent" if not paid on or before the fifteenth day of the third month following the close of the income year, contends that Wrigley's taxes were in fact delinquent and that the penalty interest rate is thus appropriate.

We agree with the department, and we find the reasoning of dissenting Commissioner Junceau to be

particularly persuasive on whether this was an "additional assessment" within the meaning of sec. 71.13(2), Stats. (1985-86). Wrigley had never reported or paid franchise tax in any of the years under review. The assessment came as a result of a field audit conducted by the department "for the purpose of making a determination of the [company's] taxable income . . . ." Sec. 71.11(20)(b), Stats. (1985-86). Under sec. 71.11(20(c), if the audit reveals "that no assessment has been made when one should have been made, the department shall make a correct assessment . . . ." Thus, the statutes under which the assessment was made contemplate an initial, rather than an "additional" assessment. The latter term must, as Commissioner Junceau suggests, "assume[] the filing of a return and self-assessment or some other previous assessment."

We have some sympathy with Wrigley's position that where, as here, a taxpayer believes it owes no tax and thus files no returns, and it is later determined after extensive agency and judicial proceedings that taxes were in fact due

in the years in question, it makes sense to treat the due date for penalty purposes as some time after the final court determination of liability. But the legislature has plainly spoken in secs. 71.13(1)(a) and 71.10(9)(a), Stats. (1985-86). Under the latter, a tax is delinquent if not paid by the stated due date; and under the former, delinquent taxes are subject to interest at the rate of 1.5 percent per month. We see no room in the statutory language for the result sought by Wrigley. The department correctly applied the applicable statutes in its imposition of statutory interest on Wrigley's assessment.

By the Court.--Order reversed and cause remanded with directions to enter an order affirming the decision of the Wisconsin Tax Appeals Commission insofar as it upheld the franchise tax assessment and reversing the decision insofar as it authorized imposition of interest on the assessment at a rate lower than 1.5 percent per month.

Publication in the official reports is recommended.

No. 88-2265

DYKMAN, J. (*dissenting*). It is undisputed that 15 U.S.C. sec. 381 was enacted to overturn *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and to dispel the "serious apprehension" about that case. It is also undisputed that Congress intended to exempt not only solicitation, but "also those acts which, according to custom and practice in the particular industry, are those that lead to the placing of orders by customers" Maj. op. at 10. Therefore, the majority should have analyzed this case in the context of the manner by which the chewing gum industry sells its product. Instead, the majority adds up acts which it concludes make a list long enough to take Wrigley out from the protection of 15 U.S.C. sec. 381.

The circuit court focused on the way chewing gum is sold. Eighty-five to ninety percent of Wrigley's sales managers' time is spent soliciting. Over ninety percent of Wrigley's sales are "impulse sales." Thus, a customer's observation of a Wrigley product must create the desire to

purchase, or the business activity fails. If the customer, when observing a Wrigley display, recalls a taste of stale gum, or if the display is sloppy, dirty, or unattractive in any way, the sale may not occur. The display must contain the customer's preferred flavor. It is not surprising therefore, that a Wrigley's sales manager does whatever necessary to maintain an attractive display. His or her activities in relation to that display are therefore without a doubt for the purpose of "inducing customers to place orders."

Of course, the sales managers did not tend to the displays in a vacuum. When Pennsylvania focused on the use of a company car as evidence that sales managers were doing more than "mere solicitation" the court replied, "Congress could hardly have intended to exempt only walking solicitors." *United States Tobacco v. Commonwealth*, 386 A. 2d 471, 478 (Pa.), *cert. denied*, 439 U.S. 880 (1978).

Congress could have hardly intended to exempt solicitors without records or a place to keep them, or to

make exemption dependent upon whether solicitors met on occasion to compare notes or hear of the latest fad in consumer taste. With eighty-five to ninety percent of a sales representative's time spent soliciting, and some time devoted to record keeping, very little time remained to engage in the list of duties the majority finds dispositive.

I would view these other activities, not by the length of the list, but as the *de minimis* result reached when all are totalled. When I do so, I reach the same result as did the circuit court. I would therefore affirm and not reach the question of whether an interest penalty is applied.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCHES 3, 8

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Respondent,

vs.

MEMORANDUM DECISION AND ORDER

Case Nos. 87-CV-7478
87-CV-7468

WILLIAM WRIGLEY JR. COMPANY,

Respondent-Petitioner.

Both parties seek review, pursuant to ch. 227, Stats., of a decision and order of the Wisconsin Tax Appeals Commission (commission) dated November 25, 1987. The matters were consolidated by order of this court on September 9, 1988.

The William Wrigley Jr. Company (Wrigley) seeks review of that part of the commission's order which upholds the imposition of a franchise tax on its sales in Wisconsin for the years 1973 through 1978 by the

Wisconsin Department of Revenue (department). Wrigley contends that Wisconsin lacks jurisdiction to impose the tax by operation of Public Law 86-272 (15 U.S.C. 381), which provides that no state shall have power to impose a tax on income derived from interstate commerce if the only business activities of the taxpayer within the state are solicitation of orders sent outside the state for approval and shipment.

The department seeks review of that part of the commission's order disallowing the imposition of interest on the tax in question at the delinquent tax rate pursuant to sec. 71.13(1), Stats. It contends that the 18 percent rate of interest imposed by this section, rather than the lower rates of interest imposed by section 71.09(5)(a), Stats.,[1] is applicable to foreign corporations which fail to file returns in this state even when such a corporation acts, as here, on advice of counsel that it is immune from taxation under federal law and has no liability or obligation to file under Wisconsin law.

PRIOR PROCEEDINGS AND REMAND

The commission's decision and order of November 25, 1987 reinstated in its entirety--with one substantive clarification--its earlier decision and order dated November 18, 1986, which had also been the subject of both parties' petitions to review in Dane County Circuit Court. That decision had been based upon the transcripts of a two-day hearing on August 26 and 27, 1985 before then-Commissioner William Bradford Smith, sitting as a hearing examiner, on Wrigley's appeal of the department's assessment to the full commission.

Because of a legislative reorganization of the commission, Mr. Smith's term of office effectively expired in October 1985. The newly constituted commission did not consult with Mr. Smith in rendering its November 18, 1986 decision upholding the imposition of the franchise tax during the tax years in question. Circuit Court Judge Michael Nowakowski agreed with Wrigley's contention that due process required such a consultation since several of the commission's findings of fact might have been affected

by the weight and credibility of the testimony of witnesses it had no opportunity to observe. The court consequently remanded the case to the commission for that purpose. It did not reach the interest rate issue raised by the department.

Following remand, all five members of the commission met with former Commissioner Smith and heard his views concerning the credibility of Wrigley's witnesses and the appropriate weight to be accorded their testimony. In addition, Smith filed a statement of his impressions indicating that he found these witnesses' testimony to be "extremely credible," and indicating further that he would have issued proposed findings of fact, conclusions of law, and order in favor of Wrigley based upon that uncontroverted testimony.

With the chairperson of the commission not participating, and another member dissenting, a three-member majority of the commission reinstated the original decision and order. After setting forth clarifications to certain of the commission's original

findings, as hereinafter noted, the decision and order on remand specifically stated that the credibility of the witnesses "was never questioned or in issue by this Commission." It stated further:

> That testimony was completely accepted and accorded substantial weight. . . .This Commission never believed or concluded or intended to intimate [in its earlier decision] that. . .any. . .witness lied or was in any way untruthful."

Aside from the testimony adversely elicited by Wrigley's counsel from a compliance representative of the department, the only testimony in the record is that of five Wrigley employees. Their testimony, which the commission has found to be credible, is consistent, and is not controverted by the department.

FACTS

Wrigley is an Illinois corporation which manufactures and sells chewing gum products nationwide. Its headquarters are in Illinois. It has sales offices, warehouses, and/or manufacturing facilities in eight other

states, not including Wisconsin. It files tax returns in these states and in Illinois. It has never filed a tax return or paid taxes in this state, nor is it licensed to do business in Wisconsin.

During the years in question, the dollar volume of Wrigley's sales in Wisconsin ranged from $2,797,055 in 1973 to $4,392,202 in 1978. Following a field audit, the department issued a franchise tax assessment against Wrigley on October 6, 1980 in the total amount of $246,641.04, including penalties and interest, for the years 1973 through 1978. Wrigley's petition for redetermination was denied by the department on September 2, 1981, and Wrigley appealed to the commission.

The undisputed evidence adduced at the hearing establishes that Wrigley sells gum throughout the country in a substantially uniform manner, employing a hierarchical system of sales or "field" representatives who solicit orders within a specific territory; regional sales managers who oversee the field representatives in the several territories of their assigned region, and who

themselves solicit "key accounts" within that region; and district managers, who have ultimate managerial authority over the several regions in their districts.[2]

During 1973 through 1978, four or five field representatives serviced Wrigley's Wisconsin accounts. Most of them lived in Wisconsin; some of them also serviced areas in other states adjacent to Wisconsin. Each of these individuals was responsible for soliciting orders for Wrigley products from 20 to 40 "direct accounts," primarily wholesalers who received shipments of Wrigley products directly from Wrigley's manufacturing facilities outside this state. They were also responsible for paying regular visits to between 400 and 650 "indirect accounts," primarily retailers who received Wrigley products through Wisconsin wholesalers. These visits were made with the objective of increasing sales to the ultimate consumer, and thus orders for Wrigley gum, by maintaining and checking the retailer's present inventory for quantity, type, and freshness of Wrigley products and the placement and appearance of those products in displays in the retail

establishment, and by presenting promotional information explaining new products and packaging suitable to the particular retail establishment. All orders were sent to Chicago for credit approval and processing. Sales representatives had no authority to set or negotiate prices, to determine credit-worthiness of customers, or to make collections.

Two different individuals served as regional sales manager for the Wisconsin sales territories during these years, both of whom lived in Wisconsin during their tenure in that capacity. The district manager for the Mid-Western district, which encompassed Wisconsin, lived and was headquartered in the Chicago area throughout the period in question.

Wrigley supplied each field representative and each regional manager with a company car, and reimbursed each for gas and service expenses, as well as for business expenses such as overnight lodging, meals, and long distance phone charges. Each individual also received a supply of sample gum products, various types of display

racks, and promotional literature. These supplies were kept by the individual employee at home, typically in a garage or basement, with the exception of one field representative hired in 1973, who lived in an apartment. Because he had no garage or basement available, this individual was allowed to rent storage space in his own name in a commercial facility. Wrigley reimbursed him for the expense, which was about $25 per month. This was an exception to company policy.

The retail value of the quantity of gum in the possession of the field representatives at any one time was about $1,000, although up to 40 percent of this quantity at any time might be stale products which had been removed from customers' premises for subsequent destruction, and thus of no value. This gum was carried on Wrigley's inventories, and each representative was required to account for it. Display cases, which were placed free of charge in customer's premises, were not carried on Wrigley's inventories or accounted for by field representatives.

Because Wrigley products are primarily "impulse" purchases by the ultimate consumer, the location and appearance of product displays in individual premises was considered to be of primary importance in soliciting accounts. New displays were placed in retail account premises on a daily basis by Wrigley sales representatives, and were thereafter considered to be owned by these accounts. Usually these displays were filled from stock on hand in the account's facility. When this was not possible, they were filled with gum carried by the sales representative. On these occasions, about once a month, the representative would typically fill out an "agency stock check" indicating the amount of gum supplied. This "stock check" would be forwarded to the Chicago office, which would bill the account's wholesaler, who would in turn bill the retail account. Alternatively, the sales representative would replenish his own supply of gum from the account's wholesaler, who would then bill the account. In no case did any account pay the sales representative for the gum provided.[3]

Field representatives also used the supply of gum they carried to replace stale gum on the premises of their accounts. The gum packages bear a product-freshness expiration date. Unsold gum on hand past that date was replaced with fresh product; the stale gum was usually boxed and sent to Chicago by common carrier and occasionally destroyed locally. No charge was made to the account for the replacement, which was treated as an exchange. The purpose of the exchange was to increase sales by ensuring that the ultimate customer received fresh gum, thus attracting additional purchases.

Regional managers performed many of the same duties as field representatives with respect to "key" accounts. In addition, they supervised, evaluated, and made hiring, firing, and promotional recommendations to the district manager with respect to the field representatives in their regions. The district manager had the final authority concerning all personnel decisions; he could, and did, override the regional manager's recommendations at will.

When vacancies occurred in the field, the sales manager would interview applicants who responded to in-state newspaper ads or whose names had been obtained by word-of-mouth or from job placement agencies in Wisconsin. These interviews would take place in a Wisconsin hotel, motel or restaurant. The Chicago district manager had the final say in all hiring decision.

New-hires received on-the-job training in the field accompanied by experienced field representatives.[4] On occasion, the sales manager would accompany a field representative in visiting accounts, both for purposes of evaluating the field representative and his territory, and of demonstrating effective sales techniques. The sales manager would also sometimes meet with one or more field representatives in order to discuss sales strategy, and these meetings would take place at a motel or coffee shop in Wisconsin.

John Kroyer, the regional manager who served in Wisconsin between 1972 and March, 1976 testified that he spent between 80 and 85 percent of his time "in the field"

in active solicitation of accounts, alone or in the company of a field representative, and the balance of his time on administrative duties. He "occasionally" held meetings with his entire sales force, "probably averag[ing] one a year when we got everybody together." These meetings were held at his home and, on one occasion, at a motel with members of another region's sales force following the introduction of a product package change by Wrigley. The occasional meetings "were mainly sales strategy meetings, how we could get additional volume, how we could improve content merchandising. They were all related to sales, how we could get greater sales."

Kroyer answered affirmatively when asked whether he maintained an office in his home. Subsequently he testified that this office consisted of a corner of his basement, where he had a desk and phone. He kept all his files, including personnel files, and "everything pertaining to the job" in this corner. He had one company-issued file cabinet. He took a tax deduction for this space on a square foot basis. Wrigley did not reimburse him in connection

with this office, and there is no suggestion in the record that he met customers or field representatives there.

Kroyer also testified that on some occasions, "[p]robably a couple, three times a year," he had "interceded" or tried to "mediate" in credit disputes involving "a really good account." He testified: "I never interceded. . .until a letter got rather nasty with a really good account. Then I would intercede to the point where I would see if I couldn't get the account [and] Chicago together to find out what the problem might be, but I never tried to collect." Both sales managers and field representatives routinely received copies of correspondence from the Chicago office to accounts regarding credit problems. All other testimony pertaining to these letters is that they were routinely ignored and discarded.

Gary Hecht, the regional sales manager for Wisconsin during March 1976 through 1978 testified that he spent 90 to 95 percent of his time soliciting sales in the field, and "a very small portion" of time in sales meetings. Once or twice a year, day-long meetings were held, typically at a

hotel or motel, "when the company had a major thrust or objective such as the introduction of a new brand or a new packaging," where "details were important to communicate accurately and necessitated getting together with the field representatives face to face." The balance of his time was spent performing administrative duties, primarily written or oral communications with Chicago, and in telephone communications with his field representatives.

The record contains a variety of personnel reports all tending to establish that among a regional manager's administrative dutes was the duty to evaluate the performance of his field representatives and to make various recommendations concerning their salaries and continued employment, and that his own performance was similarly being evaluated by his superiors during the years in question.

The department introduced into evidence a September 1979 job description for the position of regional sales manager which listed as a "principle activity" of the job:

"Represents the company on credit problems as necessary."

When asked about this language, Hecht responded:

> I have no idea what that refers to. It's never come up in the nine or ten years that I have been regional sales manager, and nobody has ever brought to my attention on my performance appraisals that I was neglecting one of my duties. So I really have no idea what that means.

Wrigley advertises extensively nationwide on television, on radio, and in newspapers, and this advertising appears regularly in Wisconsin. The commission found that spot television and radio advertising for Wrigley products was purchased during the years at issue in several Wisconsin cities, and that some of the newspaper advertising which appeared in newspapers printed and sold in Wisconsin included coupons which the reader could clip and present to retailers for a premium or reduced price on Wrigley products. The evidence is undisputed, however, that all such advertising was managed and purchased through an advertising agency in Chicago. The commission did not mention this fact in its findings. None of Wrigley's Wisconsin employees had any

input into or control over any type of advertisement appearing in Wisconsin.

Wrigley owns no real estate and operates no manufacturing or warehousing facility in this state. It has no bank accounts, business office or address, or telephone listing in this state. The business cards carried by its agents list only a Chicago-area business address and phone number. All deliveries of orders solicited by its Wisconsin agents are made from outside the state by common carrier. All orders for Wrigley products are approved or disapproved in Chicago, where all pricing and credit matters, including collections, are also handled. Although it solicits orders in all states in the nation, it pays taxes only in the nine states in which it has corporate offices, warehouses, or manufacturing facilities. No other state has imposed the equivalent of Wisconsin's franchise tax on a proportionate share of Wrigley's sales; two other states which have specifically considered the question have determined that Wrigley's substantially equivalent

activities in those states are protected by 15 U.S.C. sec. 381, and thus that no tax may be imposed.

APPLICABLE LAW

Wisconsin's franchise tax is set forth in section 71.01(2), Stats., which provides, in material part, as follows:

> For the privilege of exercising its franchise or doing business in this state in a corporate capacity. . .every domestic or foreign corporation. . .shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year. . . .

Because the Commerce Clause of the United States Constitution grants to Congress the exclusive power to regulate interstate commerce, no state has power to impose a direct tax upon the "privilege" of engaging in interstate commerce. *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). The states may, however, consistent with that Clause, impose a tax on the net income generated by interstate commerce "'which is attributable to earnings within the taxing state,'" *Id.*, 358 U.S. at 462, quoting

Wisconsin v. Minnesota Min. & Mfg. Co., 311 U.S. 452, 453.

> [I]t is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State.

Id., at 461-62.

The fundamental requirements of the Due Process Clause must also be met before any state may exercise taxing jurisdiction over a taxpayer. The test is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it may ask return." *Wisconsin v. J.C. Penney Co.*, 311 U.S. at 435, 444 (1940). In *Portland Cement, supra*, the United States Supreme Court held that the due process test was met by a tax imposed on that portion of net income which arose from the corporate taxpayer's activities within the state, which it described as "a regular and systematic course of solicitation of orders for the sale of its products, each order being

subject to acceptance, filling and delivery by it from its plant [in another state]." 358 U.S. at 454. Such activities, it held, "form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.'" 358 U.S. at 464, quoting *J.C. Penney, supra*, 311 U.S. at 445.

Seven months following the Supreme Court's ruling in *Portland Cement, supra*, Congress enacted the federal statute at issue in this case, Public Law 86-272, governing the imposition of net income tax by states on income from interstate commerce. Codified as 15 U.S.C. sec. 381, the law provides in material part as follows:

Minimum Standards

> (a) No State. . .shall have power to impose. . .a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

> (2) the solicitation of orders by such person, or his representative in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The term "solicitation" is not defined in the statute. Nor was a substantive definition approached in the only United States Supreme Court case to have considered this legislation to date, *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). Consequently, the legislation has spawned litigation at the state level focused on the same question presented by this case: whether the activities within the state of the interstate business whose net income is sought to be taxed fall within the protection of the statute.

ISSUE AND STANDARD OF REVIEW

On this review, the department states the issue as follows:

> Whether the Commission could reasonably have concluded that Wrigley had nexus in Wisconsin for franchise tax purposes because Wrigley engaged

> in more than the mere solicitation of orders for acceptance and shipment outside this state.

Consistent with this phrasing of the issue, the department cites its own administrative regulations governing "nexus" determinations, and several Wisconsin cases holding that reviewing courts must defer to agency interpretations of the laws it is charged with administering. It contends that because the agency has evinced its intention through these regulations to construe Wisconsin statutes broadly, so as to "afford the State of Wisconsin maximum statutory latitude to tax sales not covered by the federal statute," the reviewing court should extend its deference to the agency's approach by imposing, or confirming, a concomitantly narrow construction of the federal statute in question.

Wrigley contends that the sole issue presented by this case is whether the activities of its sales force during each of the years in question constitute solicitation of orders within the meaning of the federal statute, thus placing it outside the taxing jurisdiction of Wisconsin. It contends further that because this question is strictly a question of

federal law, no deference is due to a state agency's resolution of the question.

This court concludes that the interpretation of 15 U.S.C. sec. 381 is the dispositive, if not the only, issue of the case. Congress set forth in that statute what it termed "minimal standards" for the exercise of state jurisdiction to tax income derived in a state through interstate commerce. So long as the activities of a business are within the penumbra of protection afforded by the statute, these "minimal standards" are not met and the state has no *power* to tax, regardless whether "nexus," in the constitutional sense, exists.

Nexus considerations present a discrete, separate issue from the issue posed by this case; they are aimed at answering constitutional concerns arising out of the Due Process and Commerce Clauses, as to whether some "'minimal connection. . .between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise'" support the imposition of the

state's taxing jurisdiction. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983).

If immunity is lost by activities in excess of the category of activities protected by 15 U.S.C. sec. 381, then a nexus/minimal contact analysis of all of the business' activities in the state is appropriate and necessary to address the constitutional limitations on a state's power to tax income derived from interstate commerce. Until that determination is made, however, a nexus analysis is premature, and may serve to blur lines which must be kept distinct in order to resolve the purely statutory question which precedes it.

Whether Wrigley's activities in Wisconsin exceed the statutory immunity conferred by 15 U.S.C. sec. 381 is a question of statutory interpretation of that statute only, within the context of the facts of record. The department's suggestion that the intended application of that law is variable, depending on the breadth of local statutes and regulations in the various states in which it is interpreted, must be rejected. The question in interpreting any statute

is what the legislature, here Congress, intended. It is not reasonable to suppose that Congress, in the exercise of its plenary power to regulate interstate commerce, passed a law which it intended to be applied other than uniformly throughout the states.

> It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. . . .When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). *See also, Leo Feist v. Young*, 138 F.2d 972, 976 (7th Cir. 1943).

Both interpretation and application of statutes are questions of law, as to which courts are not generally bound by agency determinations. *West Bend Education Association v. Wisconsin Employment Relations Commission*, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984); *NCR Corporation v. Department of Revenue*, 128 Wis. 2d 442, 447, 384 N.W. 2d 355 (1986). Although "due weight"

is to be "accorded the experience, technical competence, and specialized knowledge of the agency involved," sec. 227.57(10), Stats., the weight that is "due" is not "great" in all cases.

The cases cited by the department in support of its contention that the commission's interpretation of this federal statute is entitled to great weight on review, and that this court is bound to accept that interpretation if there is a rational basis for it,[5] do not deal with an agency's interpretation of federal law, much less with one proscribing this state's imposition of the very state laws the agency is charged with administering.

In *School District of Drummond v. Wisconsin Employment Relations Commission*, 121 Wis. 2d 126, 132-33, 358 N.W.2d 285 (1984) the Wisconsin Supreme Court stated:

> *When the legislature charges an administrative agency to apply and enforce a particular statute. . .*,the agency's construction and interpretation of the statute are entitled to great weight and any rational basis will sustain its practical interpretations. *Arrowhead United Teachers v. ERC*, 116 Wis. 2d 580, 593, 342

> N.W.2d 709 (1984); *Beloit Education Asso. v. WERC*, 73 Wis. 2d 43, 67, 242 N.W.2d 231 (1976). We have qualified this standard, though, by stating that where the question involved is one of first impression, the court will accord the agency's interpretation only due weight in determining the appropriate statutory construction, rather than the great weight-rational standard. *Berns v. Wis. Employment Relations Comm.*, 99 Wis. 2d 252, 261, 299 N.W.2d 248 (1980). The great weight-any rational basis standard applies in situations where the "'commission's interpretation reflects a practice or position "long continued, substantially uniform and without challenge by governmental authorities and courts."' *Id.*, citing *Wood County v. Bd. of Vocational, T. & A. Ed.*, 60 Wis. 2d 606, 618, 211 N.W.2d 617 (1973) *Arrowhead*, 116 Wis .2d at 594. [Italics supplied.]

Similarly, the supreme court has held that "while due due deference must be accorded an agency's application of the law to the found facts when the agency has particular competence or expertise in the matter at hand," no such deference is required when courts are as competent as the agency to decide the question presented. *Department of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). *See also, Xerox Corp. v. Department of Revenue*, 114 Wis. 2d 522, 526, 339 N.W.2d 357 (1983).

This case presents an issue of first impression in Wisconsin courts. It involves the meaning of a federal statute which expressly prohibits states from asserting tax jurisdiction, or administering local taxing authority, over a business whose "only" activities in the state fall within a specified category. Even if the commission's expertise in determining Wisconsin's jurisdiction in this type of case were assumed, no such expertise was demonstrated in this case.

In rendering its decision, the commission did not purport to examine the rationale of the statute itself, its legislative history, or the cases from other states which have construed it in a variety of circumstances. Instead, the commission analyzed the facts of this case against the standard of the agency's "nexus" regulations promulgated in 1979, the year following the last tax year at issue in this case,[6] and certain guidelines for the application of 15 U.S.C. sec. 381 set forth in a resolution of the Multistate Tax Commission (MTC) passed in 1985.[7] The MTC is an organization of state tax revenue agents which

has formally proposed the repeal of 15 U.S.C. sec. 381. *All States Tax Guide* (P-H) sec. 694-B. Although its resolution was not cited by either party in the briefs submitted to the commission, the commission summarily "adopted" the guidelines wholesale in its original decision in this case, and stated that their application to the facts of the case "compelled" it "to conclude that Wrigley did indeed cross the line and lost the protection afforded" by the federal law.[8]

Following remand from the original review of this case in Dane County Circuit Court, and despite the articulate dissent of one of its members questioning how regulations and guidelines promulgated one and seven years, respectively, after the last tax year at issue in the case could be applicable to its resolution, the majority of the commission "affirmed" its original decision and order without considering the retroactive implications of its action.[9] Neither did it consider the propriety of adopting the "informational" guidelines of a professional association

of revenue agents and applying them to the facts of this case as though they were the substantive law of Wisconsin.

Although the commission cited two cases from other jurisdictions as supportive of its determination, it did not discuss the reasoning of those cases or of any of the other applicable caselaw, which had been cited in the parties' briefs to the commission, in reaching its conclusion that "the considerable activities of Wrigley" during 1973 through 1978 "transcended the solicitation of orders protected by P.L. 86-272 [15 U.S.C. sec. 381] irregardless of whether the DOR or Wrigley had the burden of proof to show it."

This court concludes that the commission's determinations of law in this case neither constitute nor incorporate an interpretation of 15 U.S.C. sec. 381 to which this court must, or should, give special deference.[10]

Similarly, no deference is due to the commission's ultimate findings of fact in this case. The historical, evidentiary facts of record are undisputed, having been adduced solely from the non-conflicting testimony of

Wrigley's witnesses, whom the commission found to be credible. These facts do not give rise to conflicting inferences; it is, rather, their legal significance under the federal statute which is in conflict. In determining their legal significance, the commission did not look to the statute. Instead, it adopted the MTC guidelines, and stated that the application of these guidelines "compelled" it to conclude that Wrigley lost the protection of the statute by engaging in ten specific "non-immune" activities "during the years 1973-1978 in the state of Wisconsin," which it listed as follows:

1. replacement of stale gum
2. maintaining product displays both as to location design and content
3. direct sales of gum by use of "agency stock checks"
4. maintaining offices in home
5. conducting regular and periodic training seminars in Wisconsin
6. recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
7. involvement in credit transactions by regional manager
8. training and supervising sales representatives by regional sales manager
9. rental of storage space in Madison, Wisconsin
10. the purchase of non-incidental advertising in Wisconsin

The commission's sole discussion of these activities in its original opinion is the following paragraph:

> A perusal of the position description of the Regional Manager is helpful. Although increasing sales volume was obviously the primary goal of all of Wrigley's employees in Wisconsin, the regional manager also performed other important managerial and supervisory functions, all within the confines of the State. One of his listed principal activities was to "represent the company on credit problems as necessary". Although petitioner attempted to minimize this responsibility at the hearing before this Commission, its regional manager testified that "a couple, three times a year" he mediated credit problems between a very good account and his credit department in Chicago. This alone clearly exceeds the "solicitation of orders."

In its decision following remand from the initial circuit court review, in apparent response to Judge Nowakowski's observation that only one of the two regional sales managers testified as to any kind of involvement in credit transactions during 1973-1975, and that "analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. sec. 381 must. . .be done on an annual basis,"[11]

the commission made the following clarification to its original language:

> Although the company job descriptions of both [Regional Managers] Hecht and Kroyer called for them to participate in credit transactions, it is clear and uncontroverted from their testimony that Gary Hecht, regional manager from 1976 to 1978, had no involvement of any kind in credit transactions with Wrigley customers while John Kroyer, regional manager from 1973 to 1975, did.
>
> . . . .
>
> Although the credit transaction was highlighted in its Opinion, this Commission did not rest its decision on that basis alone but rather relied on the totality of all the different non-immune activities specified at page 25 of its Opinion, including the credit activities in 1973 to 1975 as well as the maintaining [of] home offices and conducting regular and periodic training seminars in Wisconsin, which findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record.

This court has carefully examined the record. Although the commission's clarified finding with respect to "involvement in credit transactions" is supported by the evidence, there is no evidence in the record whatever that "regular and periodic training seminars" were conducted in Wisconsin. It is undisputed that all training of new recruits

took place on-the-job, in the field, during the course of actual solicitations of customers. It is undisputed that only occasional meetings were held at which sales strategy was discussed, particularly when new Wrigley products were introduced. There is also no evidence that Wrigley maintained, authorized, approved, or knew of any offices in the homes of its Wisconsin employees. The only evidence on this point is that a single employee, regional manager Kroyer, had a company-issued file cabinet in the corner of his basement where he kept Wrigley personnel files and supplies during 1973-75, that he took a tax deduction for this floor space, and that he received no reimbursement from Wrigley for the use of this space.[12] Even if the substantial evidence test applied, these particular findings, upon which the commission seemed to place special emphasis, would have to be qualified or set aside as unsupported by the substantial evidence.

Similarly, the commission's reliance on "rental of storage space" in Wisconsin as an activity forfeiting immunity ignores the fact that the only such space was

rented not by Wrigley, but by a single employee who had no alternative space available to store supplies essential to his solicitation of accounts, and as an exception to company policy. Its reliance on "the purchase of non-incidental advertising in Wisconsin" both ignores the fact that all advertising was purchased from outside the state and appends the unexplained legal conclusion that this advertising was "non-incidental" to solicitation of orders.[13] Its reliance on "direct sales of gum by use of 'agency stock checks'" also imposes a questionable legal interpretation on an infrequent type of transaction which never, according to the undisputed testimony of Wrigley's witnesses, involved the payment of money or other consideration to the salesman nor the negotiation of price--both of which were matters handled through Chicago.

Where the material facts are not in dispute, and the question is the legal significance of those facts under the applicable rule of law, the question is one of law, *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763, 768 (1980), and the reviewing court owes no special

deference to the agency's determination. *Wisconsin Bingo Supply & Equipment Co. v. Wisconsin Bingo Contorl Board*, 88 Wis.2d 293, 308, 276 N.W.2d 716 (1979); *Frito-Lay, Inc. v. Labor & Industry Review Commission*, 95 Wis. 2d 395, 400, 290 N.W.2d 551 (Ct. App. 1980). Where only one reasonable inference may be drawn from the evidence, the drawing of that inference is a question of law. *Vocation, Tech. & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41, 46 (1977). Where the question is one of mixed law and fact, that portion of an agency's determination which constitutes tHe assignment of legal meaning to facts is one of law. *Wisconsin Dept. of Revenue v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94, 101 (1979), aff'd, 447 &.W. 207 (1980).

The evidence being undisputed in this case, and the commission having found that the testimony presented by Wrigley's witnesses was credible, the dispositive question for review is one of law: Whether one or more of Wrigley's activities in Wisconsin, viewed separately or in their totality, exceeded the activity Congress sought to protect

from tax consequences when it enacted 15 U.S.C. sec. 318. Because this court concludes that the protection of the federal statute was not forfeited by Wrigley's activities, and thus that Wisconsin "was prohibited from imposing the tax in question, it is unnecessary to reach the department's contention that interest should have been assessed at a higher rate than that allowed by the commission.

DISCUSSION

Because Congress did not define "solicitation" in 15 U.S.C. sec. 381, and has offered no other guidance for ascertaining the breadth of the activity it intended to protect when it enacted the statute in 1959, the question has been presented in a variety of contexts to state courts throughout the nation. The United States Supreme Court has repeatedly refused to review both cases finding immunity under the statute, and those holding that immunity has been forfeited by acts in excess of solicitation.[14] In the only case to consider the statute to

date, *Hublein v. South Carolina Tax Commission*, 409 U.S. 275, 279-280 (1972), that Court stated:

> The impetus behind the enactment of sec. 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 US 450, 3 L Ed 2d 421, 79 S Ct 357, 67 ALR2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 US, at 452, 3 L Ed 2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub L 86-272, 73 Stat 555, 15 USC sec 381, within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that "mere solicitation" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement and not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did of course implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy.

Heublein did not address the scope of sec. 318, holding that the statute did not apply to a liquor manufacturer and distributor which was required, by state liquor regulatory provisions the Court held to be lawful, to disqualify itself from the statute's protection by transferring its products within the state rather than delivering them "from a point outside the state" as sec. 318 specifies. "We need not decide," the Court said, "whether. . .the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term 'solicitation.'" 409 U.S. at 278.

Such business activities and others have been scrutinized by state courts in cases dealing with a given business' claim of immunity under 15 U.S.C. sec. 381 from that state's taxes, and also in the so-called "reverse-nexus" cases, in which the question is whether business activities in another state render it subject to taxation there, so as to entitle the business to allocate a portion of its income otherwise taxable in this state to a

foreign taxing jurisdiction. *See, eg., Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081 (Or. 1976); *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1974); *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P. 2d 233 (Or. 1966).

Regardless whether a state is asserting tax jurisdiction over a foreign corporation on grounds that its local activities exceed the protection of 15 U.S.C. sec. 381, or is contesting the allocation of income to a foreign jurisdiction on grounds that the business' activities in that state are "mere solicitation" and thus immune, the issue of law that must be resolved is the same: are the activities in question "mere solicitation" within the meaning of the federal statute, or are they something more?[15] Nowhere is this question more difficult to resolve than in a case, as here, where the business operates through a sophisticated sales force, including domestic field representatives, to promote a continuous and increasing flow of new and repeat orders for its products in a competitive multi-state market. State courts have taken various approaches to resolving the

question, which one court has described as falling within a range viewing "solicitation," at its narrowest, as "the specific act of asking a customer to purchase one's product," to a middle ground including "any act which leads to the purchase of one's product," to a broad conception including "any act which leads to or follows from the purchase so long as said act is incidental to the purchase." *Chattanooga Glass Co. v. Strickland*, 261 S.E.2d 599, 600-601 (Ga. 1979).

The state of Oregon has had a substantial share of the cases applying 15 U.S.C. sec. 381, and has employed both broad and narrow interpretations. In *Smith Kline & French Laboratories v. State Tax Com'n*, 403 P.2d 375 (Or. 1965), one of the first cases to apply the federal statute, the Oregon Supreme Court rejected a strict, act-of-solicitation-only construction in a case where pharmaceutical salesmen did not directly solicit orders, but rather promoted the use of the company's products by explaining their usefulness and encouraging doctors to prescribe and druggists to stock them. Referring to several

congressional committee reports published concurrently with the enactment of 15 U.S.C. sec. 381, the court (adopting the language of the tax court) concluded:

> "These reports show that Congress intended to exempt not only the specifically described phase of interstate sales efforts but also all lesser, included phases.
>
> Furthermore, the nature of plaintiff's business makes its activities in Oregon the equivalent of solicitation of orders in other, less technical businesses. . . .A realistic legal and factual interpretation of P.L. 86-272 requires exemption of plaintiff from Oregon corporation income tax." 403 P.2d at 377-78.

The following year, in *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P.2d 233, at 239 (Or. 1966), the same court held in a reverse nexus case that an Oregon building materials corporation was entitled to an apportionment of its net income between Oregon and Washington because "its Washington activities clearly encompassed more than 'solicitation' only." These additional activities, through a single Washington salesman, included collection of delinquent accounts "on numerous occasions," pick-ups of returned merchandise from customers, occasionally giving spot credit and accepting orders, and customarily carrying

a supply of small items which he sold and delivered in Washington. In subsequent holdings, the Oregon court added the collection of deposits and advances on orders,[16] and the pooling and exchanging of technical personnel "in a complex mutual endeavor"[17] to its list of "nonimmune" activities. In *Olympia Brewing Co. v. Department of Revenue*, 511 P.2d 837 (Or. 1973), cert. den. 415 U.S. 976 (1974) the court affirmed per curiam the tax court's determination that a multi-state beer seller had exceeded the protection of 15 U.S.C. sec. 381 by maintaining beer kegs used to dispense Olympia draft beer in Oregon retail establishments, while declining to express an opinion as to tax court's conclusion that the corporation's other activities--including the field representatives' regular inspection of retail inventories to determine potential shortages, and their efforts to obtain maximum displays at each retail outlet--constituted mere solicitation.

It is against this background that the Oregon court decided *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081 (Or. 1976), one of the two court cases cited

by the commission in support of its decision in this case. *Miles* was a "reverse nexus" case in which a pharmaceutical corporation concededly taxable in Oregon, where one of its distribution warehouses was located, sought to exclude a portion of its net income otherwise taxable in that state on grounds that it was attributable to non-immune business activities in the adjoining state of Washington.[18]

The stipulated facts in *Miles* were skeletal. Like Wrigley, Miles sold its products through a nationwide system involving a central headquarters which approved all orders, distribution warehouses in several states (including Oregon), and salespeople assigned to solicit orders in specific sales territories. Unlike Wrigley, it was licensed to do business and paid taxes in the state whose jurisdiction to tax was at issue (Washington), and maintained a registered agent there. It was stipulated that Miles' twelve Washington salesmen routinely replaced damaged goods from their supply of samples, and arranged appropriate displays of Miles' products in retail facilities.

The supreme court said that in *Olympia Brewing, supra*, it had adopted the following "reasoning of the Tax Court, which stated:

> '. . ."solicitation" should be limited to those generally accepted or customary acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. . . .' *Olympia Brewing Co. v. Dept. of Rev.*, 5 OTR 99, 110 (1972)." *Miles, supra*, 546 P.2d at 1083.

The supreme court concluded without further discussion that Miles' activities in Washington exceeded solicitation, thus rendering it subject to taxation in that state and entitling it to allocate its income for Oregon tax purposes. 546 P.2d at 1083. The supreme court did not point out that the quoted reasoning of the *Olympia* tax court upon which it relied had led the tax court to conclude that Olympia's regular inspection of inventories and its work on advertising displays amounted to no more than solicitation, and was thus protected by the statute. It is not clear from the court's opinion what weight, if any, the fact that Miles

was licensed to do business in Washington and paid taxes there may have had in its conclusion.

The only other case cited by the commission as supporting its decision in this case is *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985). The case involved an Ohio corporation which sold household products through a single salesman in North Dakota. In addition to soliciting orders, the salesman replaced damaged merchandise with products he carried in his car for that purpose, checked product inventory, checked retail prices to determine whether they were competitive and occasionally asked retailers to reduce prices to a competitive level, traced late shipments, sold aisle displays developed by Drackett and installed them, and monitored shelf placement of products. The court noted an opposing line of cases, but relied on *Miles, supra*, among others as establishing the following "general rationale":

> [A] business exceeds the mere 'solicitation of orders' for purposes of tax exemption under 15 U.S.C. sec. 381 if its activities go *beyond acts necessary for and leading to the placing of orders*. Following that rationale, we conclude that if an

> out-of-state business engages, within this State, in *other ongoing activities which are commonly associated with maintaining a business operation*, it s not exempt from North Dakota taxation under 15 U.S.C. sec. 381. However, by performing such activities in isolated instances the business does not necessarily exceed solicitation nor lose the tax exempt status under that provision. 370 N.W.2d at 726. (Italics added.)

The only other case cited by the department in support of the commission's decision, which is arguably on point with this case is *Clairol, Inc. v. Kingsley*, 262 A.2d 213, aff'd. 270 A.2d 702 (N.J. 1970), app. dism. 402 U.S 402 (1971). Like Wrigley, Clairol is a nationwide business operating through a hierarchical sales structure. Its "detailmen," similar to Wrigley's field representatives, regularly visited retail establishments where Clairol products were sold. Their "primary function" was "to promote the public's purchase and use" of Clairol products. 202 A.2d at 217. Toward that end, detailmen set up and rearranged displays of products in the retail establishment, took inventories, prepared suggested orders, and used product samples to reward retail personnel and promote good will. Unlike Wrigley, Clairol also utilized trained

technicians who visited beauty salons not to take orders, but to demonstrate the product and teach new techniques. *Id.* The appellate court, whose opinion was affirmed summarily by the New Jersey Supreme Court, 270 A.2d 702, concluded:

> It is thus evident that Clairol's business activities in New Jersey extend beyond the mere solicitation of orders on its own behalf or on behalf of its wholesalers.
>
> That increased public favor of Clairol's products will eventually result in increased orders from retail druggists to wholesalers and from wholesalers to Clairol, or as in the case of its hair products from beauty salons to "beauty jobbers" and from the latter to Clairol, does not blanket all Clairol's activities with the protection afforded by the federal act to cases where the only business activity of the taxpayer is the solicitation of orders. 262 A.2d at 217-18.

Wrigley's sales structure had no counterpart to Clairol's technicians; no Wrigley representative had contact with the ultimate consumer of Wrigley products, or any type of "training" function.

None of these three cases, nor the other cases less closely on point relied on by the department for their "strict construction" of 15 U.S.C. sec. 381,[19] contain more

than a cursory discussion of the legislative history of the statute. Wrigley relies on several cases in addition to *Smith Kline & French Laboratories, supra*, each of which is directly on point with the facts of this case, involving a hierarchical sales structure through which the business in question had a continuous presence in the state attempting to impose a tax.

In *Gillette Co. v. State Tax Comm'n*, 393 N.Y.S.2d 186 (App. Div. 1977), aff'd, 382 N.E.2d 764 (N.Y. 1978), the state tax commission argued that the local sales representatives' practice of advising retailers on display techniques, in order to make products more attractive to the ultimate consumers, was a post-sale merchandising activity which exceeded the bounds of "solicitation" under 15 U.S.C. sec. 381. The court rejected this argument in light of the legislative history of the statute, stating:

> [A]lthough it is not possible to state a general rule demarcating solicitation from merchandising, certainly where, as here, the complaining taxpayer owns no real or personal property (except salesmen's samples) in the State and makes no repairs on its goods after sale, the purpose of P.L. 86-272 would be frustrated by permitting the tax.

> Advice to retailers on the act of displaying goods to the public can hardly be more thoroughly solicitation, i.e., in this context, an effort to induce purchase of Gillette products. Making the evanescent distinctions which would be necessary to justify the imposition of the tax upon petitioner herein would, if indulged in by the several states, tend to 'Balkanize the American economy', a result which it was Congress's purpose to prevent. 393 N.Y.S. at 191.

In *United States Tobacco Co. v. Com.*, 386 A.2d 471 (Pa. 1978) cert. den. 439 U.S. 880 (1978), the corporation's sales representatives checked inventories for freshness of product, as well as for attractiveness of display and potential shortage of supply. They also set up counter displays, gave retailers free samples of products in exchange for more extensive counter space, and made direct sales of samples to retailers at wholesale prices, accepting direct payment on these no-profit, "incidental sales." 386 A.2d at 472. In concluding that these activities were within the protection of the statute, the Pennsylvania Supreme Court extensively reviewed both its legislative history and the several lines of cases construing the statute in other jurisdictions. It viewed as particularly significant

the Senate Report in support of sec. 381, which stated that the apprehension caused in the business holding in *Portland Cement, supra*, was "apparently strengthened" by that court's refusal to review *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 SO.2d 70 (1958), cert. den. 359 U.S. 28 (1959). The court said:

> In *Brown-Forman*, the foreign corporation's "missionary men," like appellant's representatives, not only sought to procure initial orders for the company's products, but also were involved in obtaining optimum counter displays for those products. . . .When Congress enacts legislation exempting "solicitation" by an interstate corporation from a state's net income tax, and does so in response to a case where the "solicitation" involved activities incidental to the initial contact between seller and prospective buyer, we as state courts are bound to give foreign corporations sec. 381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree. The foregoing analysis, however, constrains us to disagree with those courts which have concluded that Congress intended "solicitation to be narrowly construed. 386 A.2d at 478; citations omitted.

In light of this history, the Pennsylvania court concluded that such activities as advising retailers on attractive displays are "inextricably related to solicitation"

and were precisely envisioned by subsection (2) of sec. 381(a) which immunizes solicitation "for the benefit of a prospective customer." 386 A.2d at 478. Where the sales activities constitute "an effort to generate sales at the retail level" so that direct customers (wholesalers) will order more products to satisfy retail demand, it would defeat the purpose of the act to deny coverage on the basis of "evanescent distinctions between 'solicitation' and 'solicitation plus' or 'merchandising.'" *Id.*

In *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264 (Ind. 1981), the Indiana Supreme Court followed *Gillette* and *U.S. Tobacco* in holding that a Wisconsin corporation's activities in that state did not exceed solicitation. These activities, by the equivalent of Wrigley's field representatives, included such "missionary work" at retail facilities as setting up displays, checking inventories, pricing and shelving products when requested, and "work[ing] from. . .home" with, in some cases, company-supplied portable typewriters, staple guns, and the like. 382 S.W.2d at 652. Like Wrigley,

Kimberly-Clark hired a Chicago agency to handle all media advertising in Indiana. *Id.* Noting that "[n]o one or two corporate activities performed in a casual or infrequent manner should operate to remove" the protection of the federal statute, the court held:

> We also believe that Congress perceived "solicitation" as embodying "sundry activities so long as those activities [are] closely related to the eventual sale of a product.". . .Finally, when a corporate representative performs an "act of courtesy" in order to accommodate a customer, he has not ventured beyond the realm of "solicitation.". . .
>
> The aforementioned activities of the petitioner in this case may be properly categorized as "inextricably related to solicitation," or as "acts of courtesy." As such, the exemption provided by Public Law 86-272 is applicable. 416 N.E.2d at 1268.

Accord, on different reasoning, *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1973), cert. den. 419 U.S. 874 (1978)[20] and *State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964).[21]

In this court's opinion, the weight of both law and logic favor Wrigley's contention in this case that its activities in

Wisconsin during the years in question did not exceed the intended protection of 15 U.S.C. sec. 381. These activities are distinguishable from those held to have "crossed the line" in *Miles, Drackett*, and *Clairol*, even if the reasoning of those cases is accepted; they are also well within the limits discerned by those courts who have informed their understanding of the scope of the statute by considering its legislative history. Wrigley's enterprise in this state was solicitation of orders for its products, and no other. Each of the activities focused on by the commission was either inextricably related to that enterprise, or was so isolated an exception to common practice that it should not be viewed as forfeiting the protection of the statute.

No authority has been cited, and none has been found, to support the notion that advertising products for sale in national or local media is an activity exceeding "solicitation." The advertising activities of Miles, Clairol, and Drackett were not even mentioned as a factor for consideration in the immunity determinations made by the cases primarily relied upon by the commission, even

though such advertising was of major scope in two of those cases.[22] The commission's opinion does not discuss the significance of the advertising its findings describe in this case, nor does it offer any reason in that opinion or in this review proceeding for depicting the same as "non-incidental" to Wrigley's solicitation activities as that term is employed by the MTC guidelines the commission consulted. The commission made no change in its opinion after remand, despite the conclusion of one of its members in a dissenting opinion issued with the Decision and Order on Remand that advertising itself is a form of solicitation protected by 15 U.S.C. sec. 381.[23] It did not mention the fact that all Wrigley advertising appearing in Wisconsin was purchased through an out-of-state agency.

Although the nature and extent of a corporation's advertising within a state may have a bearing on determining whether it has "nexus" with that state for constitutional purposes, nexus is not the question in this case. The question is whether Congress, by prohibiting the imposition of state tax on businesses whose only contact

with the state is "solicitation," intended that the protection thus conferred would be lost by any business engaging in national or multistate advertising. There is no suggestion in the legislative history, nor any authority, for the proposition that it did; there is obvious reason to believe that it did not. It therefore follows that whether such advertising is viewed as being itself a form of solicitation, or as an activity inherently related to solicitation, it is immune from forming the basis for state taxing jurisdiction under 15 U.S.C. sec. 381.

Although several cases cited by the parties note that sales representatives "worked out of their homes" or maintained "home offices," and that they attended sales meetings within the state whose jurisdiction to tax was at issue, no court has held that such practices or activities were even relevant to the question of immunity under 15 U.S.C. sec. 381.[24] Congress did not limit the reach of this statute to only those solicitors who travel into the state from points outside it,[25] nor to those companies who

employ only one sales representative in each state in which it solicits.

Sales representatives must live somewhere, and if they live in the state where they solicit, it naturally follows that they will keep their samples, supplies, records, and other tools of their trade within convenient reach. In the absence of a company office--and it is undisputed that Wrigley had none in Wisconsin--sales representatives may be expected to keep the materials related to their employment in their homes or cars, or to acquire another suitable place to store them, as Wrigley's representatives did in this case. If they are organized people, they will probably keep those items in a discrete number of locations within their homes, especially if paperwork is a part of their job responsibility. And because they have interests in common, including the interest of serving their employer within a given geographical area, they will probably meet from time to time within that area, and they will probably talk business when they do.

As the Philadelphia Supreme Court said with respect to the universal phenomenon of the "company car" furnished to sales representatives who travel their territories, "Congress could hardly have intended to exempt only walking solicitors." *United States Tobacco v. Com.*, 380 A.2d 471, 478, cert. den. 439 U.S. 880 (1978). The same point may be made with respect to "home offices" and sporadic sales meetings of the sort described in this record. Congress could hardly have intended to exempt only salespeople who had no equipment and records to house, no paperwork to perform, and nothing to say to one another. It would defeat the purpose of the statute if state tax officials were allowed to elevate corners of basements (with or without a company-owned filing cabinet) and kitchen tables into corporate offices, or to treat occasional sales gatherings as an occasion for asserting state jurisdiction.[26]

This court views as immaterial the fact that a single sales manager took a tax deduction for his "home office" during some of the years in question, and the fact that

Wrigley chose to reimburse another employee for the cost of obtaining storage for his supplies in his own name, and the fact that some annual gatherings of sales representatives were held in a sales manager's home while other meetings may have been held in Wisconsin motels.[27] Whether or not the expenses associated with these practices are viewed as "business expenses" for tax or reimbursement purposes, the purpose of the business being conducted thereby was that of soliciting orders for products in another state, and that is within the protection of the statute.

Although the "involvement in credit transactions" of a single sales manager "a couple, three times a year" during three of the six years in question approaches a line drawn by some cases, and might properly, if routinely practiced, be viewed as exceeding it, the activity described in this record does not do so. Mr. Kroyer made no collections, a practice held to be non-immune in *Cal-Roof Wholesale, Inc. v. State Tax Commission*, 410 P.2d 233 (Or. 1966). Nor did he, so far as the record shows, pressure customers

for payment of overdue accounts, a practice noted by the state tax agency in *Clairol, supra*, 270 A.2d 702 at 703, but not discussed in the court's opinion, 262 A.2d 213.

By his own testimony, Kroyer mediated between the company and a particularly good continuing account on rare occasions when a dispute "got rather nasty." His sole purpose for doing so was not collection, but the preservation of future solicitations and orders. Even under the "strict construction" of the statute followed in *Drackett, supra*, 370 N.W.2d 723, at 726, pursuant to which a line is drawn between solicitation and "maintaining a business operation," a business "does not necessarily exceed solicitation nor lose the tax exempt status" under sec. 381 "by performing such [maintenance] activities in isolated instances." *Id.* There is no suggestion in the record that Mr. Kroyer's "credit involvement" was other than rare, or for purposes other than continuous solicitation. It should be viewed, therefore, as no more than an "act of courtesy" insufficient to forfeit the statutory immunity. *U.S. Tobacco*

v. Com., supra, 386 A.2d at 478, cert. den. 439 U.S. 880 (1978).

No court has held that a sale manager's acts of recruiting, training, and supervising, or of recommending hiring, firing, and remuneration for sales representatives within a hierarchical sales structure such as Wrigley's, are acts in excess of "solicitation." The commission's sole pertinent citation in its opinion was to its own decision in *Avon Products, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. [CCH] p. 202-710 (1986).

Avon is not on point. Unlike Wrigley's sales managers, who spent between 80 and 95 percent of their time in the field, soliciting, Avon's 35 to 60 Wisconsin managers spent *all* their working time recruiting, supervising, managing, and attending meetings. In addition, Avon's sales representatives ("Avon ladies") performed such non-immune acts as routinely delivering products and (apparently) collecting payments for the orders they solicited. No such acts by Wrigley enhance the conclusion

that its presence in Wisconsin is for a purpose broader than the solicitation of orders.[28]

Congress certainly knew when it enacted 15 U.S.C. sec. 381 that many multi-state businesses have large sales forces and hierarchical systems of management such as Wrigley's. Keeping track of those forces in their geographical areas, and maintaining control "through the ranks," is an inherent part of the efficient operation of such systems, whose whole reason for being is the solicitation of orders for products in another state. It makes no sense to believe that Congress intended to confer the solicitation immunity on multi-state businesses but to withhold immunity for the activities necessarily incident to the efficient practice of soliciting orders in fields remote from headquarters.

Wrigley's activities of replacing stale gum, maintaining product displays, and stocking those displays on occasion from sales representatives' supplies are all linked by the nature of Wrigley's market. The record is replete with information concerning the "impulse" nature of this

market, as shown by Wrigley's commissioned studies and by the experience of its sales personnel.[29] The appearance and location of product displays in retail establishments is central to moving the product to the ultimate consumer. An attractive, strategically-placed display can significantly increase impulse sales at the retail level,[30] thus increasing orders from wholesalers; fresh products sustain repeat trade by impulse buyers, who comprise over 90 percent of the market. Increased trade at the retail level means more orders from Wrigley, through its wholesalers.

Like its media advertising, and like the "promotional activities" of the pharmaceutical salesmen in *Smith-Kline, supra*, 403 P.2d 375, 377, Wrigley's activities in enhancing retail displays of its products and ensuring the freshness of products offered at retail may be viewed as a form of solicitation of the ultimate consumer, and thus as one of the "lesser, included phases" of interstate sales efforts which Congress intended to include in the protection conferred by 15 U.S.C. sec. 381. *Id.*

Although the *Miles* court viewed the similar actions of pharmaceutical salesmen as one which *followed* solicitation, and thus was not immune, it also adopted a definition of "solicitation" as "those generally accepted or customary acts in the industry which *lead to* the placing of orders." 546 P.2d at 1083; italics added. Wrigley employees testified that their activities were the same as those practiced generally in the chewing gum industry. And it is not merely the hope, but the experience of this industry, that these activities do, indeed, lead to the placing of more orders. Under the definition adopted by *Miles*, and under the reasoning of the courts in *Gillette, U.S. Tobacco*, and *Kimberly-Clark*, the display activities of Wrigley's salesmen are "solicitation" within the meaning of the statute, or are so "inextricably connected to solicitation" as to amount to the same thing. In either case, the activities do not forfeit the immunity of the federal statute.

U.S. Tobacco specifically approved the replacement of stale product, and occasional sales of supplies at wholesale prices by sales representatives who accepted payment for

the products. The "agency stock check" transactions at issue in this case are not "sales" in this sense; they do not involve the exchange of consideration, or an agreement as to price, which is fixed by Chicago headquarters and exacted by the wholesaler through normal billing routes. Unlike the purpose of the sales in *U.S. Tobacco*, which was to promote good will, *Id.*, Wrigley's purpose in making these transfers was to promote orders for its products by attractive stocking of displays.

Finally, even if these transactions were viewed as sales, they are infrequent exceptions to Wrigley's general practice and of *de minimis* value compared to its total revenues. Dissenting Commissioner Bartley computed the value of 1978 "agency stock check transfers" at 7/100,000 of one per cent of Wrigley's 4,392,202 Wisconsin sales during the last tax year in question. (Decision and Order on Remand, p. 16.) *Compare*, the dissent in *U.S. Tobacco, supra*, 386 A.2d at 480, which calculated that about five percent of that company's retail distributions in Pennsylvania were made directly by is sales

representatives. Both "strict" and "broad" constructionists of 15 U.S.C. sec. 381 agree that casual and infrequent, irregular, or exceptional activities do not forfeit the protection of the statute even if they do not fall within its terms.[30]

CONCLUSION

For all the reasons stated above, this court concludes that by reason of the operation of 15 U.S.C. sec. 381, Wisconsin was without power to impose a tax upon Wrigley's net income during the years in question. The commission's determination must therefore be reversed, and the case remanded for proceedings not inconsistent with this opinion.

Dated this 19th day of October, 1988.

BY THE COURT:

/s/ Martha J. Bablitch
Reserve Judge for
Dane County Circuit Court
Branches 3 and 8

APPENDIX

(1) The assessment at issue in this case was made prior to the amendment of sec. 71.09(5)(a) by L. 1981, Ch. 20, sec. 1090n., which made a 12 percent interest rate applicable to all nondelinquent taxes assessed on or after August 1, 1981. Under the applicable prior versions of the statute, the nondelinquent rate was six percent for the years 1973 and 1974 and nine percent for 1975 through 1978.

(2) In some states Wrigley also has agents called "key account managers," who solicit orders from the largest companies in their geographical regions. Together, these "key account' customers comprise the 20 percent of Wrigley's customers whose orders provide 80 percent of Wrigley's sales volume. There was no such agent in Wisconsin, however, in the years in question; these accounts were solicited primarily by the regional sales managers.

(3) Richard Radosevic, who served as a field representative in Wisconsin during the last half of 1978, testified as follows:

Q Well, did you ever stock new stands from your vehicle?

A I would say possibly on some--on a few occasions.

. . . .

Q And just what would--what all happened in that circumstance that you wound up putting in a new stand and taking the gum out of your vehicle and transferring it to the retailer?

A Well, like I said, primarily I wanted to get a stand in and then he wanted to get that order through his wholesaler; but if he couldn't wait, if he said my wholesaler was just in yesterday or something or he was not going to be in for a week, he didn't want a stand sitting around, so we would then fill it and then bill the wholesaler. That paperwork would go into Chicago. They would bill the wholesaler. The wholesaler would then bill that particular account.

Q And what kind of paper did you send to Chicago in that instance? What was it called?

A It was called an agency stock check.

Q Agency stock check. Was that a printed form prepared by Wrigley?

A Yes.

Q And what information was contained on it?

A Simply listed the name of the accounts or, you know, the name of the account you were putting the merch..ndise through, your name, your territory number, a complete list of all of your items and the hundred stick box equivalent.

(Tr., 8/26/85, pp. 88-89)

*****

Q Did you stock that display stand or utilize stock from your car in filling that display stand on a daily basis?

A No, I did not.

Q Where did the stock which was ultimately utilized to fill that display stand come from?

A The majority of the time it came from the store. In fact, you know, on many times when we placed a display, that's how we preferred to fill that display. If a store had, you know, excess stock of, you know, some of our other packet sizes, then I could work out a swap similar to if they had unsaleable gum where I might take their overage in some packages and give them the pack sizes that went into that particular display; but the majority of the time the stock came from the store.

Q And was it your general practice at that time in 1978 to encourage the store and the store personnel to do the actual stocking of the display?

A Whenever possible. I felt my job was sales and not stocking.

Q Was it also your practice in 1978 as a sales representative to encourage the account that you were doing business with to order the product through the normal channels; that is, the wholesaler or the direct account or that store account that store dealt with?

A Whenever and wherever possible.

Q [Y]ou have also described a report which you have termed an agency stock check. Is that agency stock check in any sense an invoice?

A No. There is no mention of any kind of pricing on it.

Q Is that agency stock check in fact the way in which you, as a sales representative, accounted internally for the quantity of product which you kept on hand?

A Yes, that and, you know, so that a retailer would have a receipt.

(Tr. 8/26/85, pp. 98-99)

(4) In 1979, Wrigley established a training center in another state. No such facility was in existence during the tax years in question on this review.

(5) The department relies on the following cases in support of its claim that much deference is due to the commission's determination: *Milwaukee Transformer Co. v. Industrial Comm.*, 22 Wis. 2d 502, 510, 126 N.W.2d 6 (1964), *Chevrolet Division, G.M.C. v. Industrial Comm.*, 31 Wis. 2d 481, 488, 143 N.W.2d 532 (1966), *Mednis v. Industrial Comm.*, 27 Wis. 2d 439, 444, 134 N.W.2d 416 (1965), *De Leeuw v. ILHR Dept.*, 71 Wis. 2d 446, 449, 238 N.W.2d 706 (1976), and *Dairy Equipment Co. v. ILHR Department*, 95 wis. 2d 319, 327, 290 N.W.2d 330 (1980).

(6) Section TAX 2.82 of the Wisconsin Administrative Code, entitled "Nexus," was effective February 1, 1979. In its decision dated November 18, 1986, and "reaffirmed" by it on November 25, 1987, the commission relied on section 2.82(1)(b), which defines "business location" as follows:

> "Business location" includes a repair shop, parts department, purchasing office, employment office, warehouse, meeting place

for directors, sales of office, permanent sample or display room, research facility or a recreational facility for use of employes or customers. A residence of an employe or representative is not ordinarily considered a business location of the employer unless the facts indicate otherwise. It could be considered a business location under one or more of the following conditions: a portion of the residence is used exclusively for the business of the employer, the employe is reimbursed or paid a flat fee for the use of this space by the employer; the employe's phone is listed in the yellow pages under the name of the employer; the employe uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to interview prospective employes, hold sales meetings, or discuss business with customers.

The commission also relied on sec. 2.82(4), which provides:

(4) WHAT CONSTITUTES "NEXUS." (a) *Factors*. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

2. Ownership of real estate in Wisconsin.

3. Ownership of a stock of goods in a public warehouse or on consignment in Wisconsin.

4. Ownership of a stock of goods in the hands of a distributor or other non-employe

representative in Wisconsin, if used to fill orders for the owner's account.

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity or in the performance of services (including construction, installation, assembly, repair of equipment).

7. Operation of mobile stores in Wisconsin (such as trucks with driver-salespersons), regardless of frequency.

8. Miscellaneous other activities by employes or representatives in Wisconsin such as credit investigations, collection of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property and licensing of intangible rights for use in Wisconsin.

10. The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

11. The performance of construction contracts and personal services contracts in Wisconsin.

(7) Those parts of the Multistate Tax Commission resolution relied upon by the commission appear, without citation, at pp. 22-24 of the decision attached to its order dated November November 18, 1986. In

"adopting" the part of its resolution reproduced in its decision, the commission omitted the following portion, quoted in Wrigley's brief to this court, as found in *All States Tax Guide* (P-H) sec. 694-C:

> [I]t is the intent of this Resolution" (1) that the contemplated document is to be *informational only* concerning each state's practices in regard to Public Law 86-272 and is not to serve as a basis upon which any person may rely as to a nexus conclusion with respect to any particular set of factual circumstances. . . .[Italics supplied.]

(8) The suggestion in the department's brief to this court (p. 22, fn. 6) that the commission's reference to the MTC guidelines should be ignored by this court because it appeared in an opinion signed by only one of its members must be rejected. The "Opinion" signed by Commissioner Timpken is physically attached to the "Decision and Order" drafted (as stated in the heading of that document) by Commissioner Timpken, signed by each commissioner, and released (together with Commissioner Junceau's separate dissent on the delinquent interest issue only) as a single document of 41 consecutively-numbered pages. That part of the document (pages 20-31) designated "Opinion" purports to speak for the commission as a whole by employing such language as: "When applying these [MTC] guidelines to the matter before *us*, *we* are compelled to conclude that Wrigley did indeed cross the line. . . ." (Italics supplied.) It sets forth the only ascertainable rationale for the commission's determinations which this court may utilize in determining what degree of deference may be due on the basis of the commission's exercise of expertise. No other member of the commission concurred separately or otherwise disassociated him- or herself from the opinion either at the time of the original decision or when it was

"affirmed" by the commission majority after remand in the face of a dissent criticizing the majority's reliance on the guidelines in question. The "Decision and Order Following Remand," signed by each member of the majority, referred to and clarified portions of the earlier Opinion in terms of "our" intention. In these circumstances, the opinion must be viewed as the collegial determination of the commission.

(9) A majority of the commission reaffirmed the original decision in the face of the following language from Commissioner Bartley's "Dissenting Opinion" at pp. 4-5 of the document released as the commission's "Decision and order on Remand":

> Adopting the statement of guidelines of the Multistate Tax Commission, the Commission reasoned that petitioner's activities in this state exceeded the levels of activity the guidelines permit a business to conduct in a state without subjecting itself to the state's taxing jurisdiction.
>
> What troubles me about the decision is that the guidelines were not then and [are] not now the law of this state, Wisconsin never having signed the statement of guidelines or otherwise [having] adopted them. Moreover, the statement of guidelines didn't even come into existence until 1985, some seven years after the last tax year involved in this case. The Commission nonetheless adopted the guidelines, an action which in my opinion was beyond its authority. Regrettably, the majority has perpetuated that error by today reaffirming that decision.

(10) *See also, Wisconsin's Environ. Decade, Inc. v. P.S.C.*, 81 Wis. 2d 344, 351, 260 N.W.2d 712, 716

(1978) (courts not bound by decisions of agency determining scope of agency's own power).

(11) Judge Nowakowski's opinion, at pp. 4-6, states in material part as follows:

> The only evidence in the record to support the Commission's finding on credit transaction involvement is the testimony of the two regional managers employed by Wrigley during the period in question and the company's formal position description for the regional manager. . . .There is nothing in the record by which the Commission could find that in 1976 to 1978 the regional manager "carried on" this activity other than to have concluded that Gary Hecht was lying [when he testified that he had no involvement of any kind in credit transactions with Wrigley customers while he was regional manager.] . . . .[T]he finding could only have [been] made through an assessment of Hecht's credibility. To have done so without the benefit of Commissioner Smith's impressions of Mr. Hecht violates Wrigley's rights to due process.
>
> DOR points to the position description for Hecht and seems to suggest not only that this constitutes substantial evidence to support the Commission's finding but also that this removes the issue from the realm of credibility evaluation. To the extent this argument is being made, it misses the point. Nexus with a state is established by reference to what a company's representatives did, not what they were authorized to do. It is "local activities" which support a state's taxing authority on the interstate operations of a foreign corporation. . . .It is also important to note that the franchise tax at issue here is imposed on an annual basis. The analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. Sec. 381 must also be done on an annual basis. . . .Even if Wrigley's activities in 1973 to 1975 remove its federal immunity to state taxation, this is not a permanent removal whereby Wrigley has no opportunity to regain it by altering its practices. [Citations omitted.]

(12) The only other Wrigley employee to be questioned about a "home office" was Richard Radosevic, who commenced work as a field representative during May of the last tax year at issue in this case. He testified as follows:

> Q During that same period of time, did you maintain an office in your home?
>
> A Not really.
>
> Q Why do you say not really?
>
> A Well, if you want to call my kitchen table and the basement [where he stored samples]--that was the extent of my office.
>
> Q Did you take a tax deduction for an office?
>
> A No, I did not.
>
> Q Did the Wrigley Company reimburse you for any expenses in connect[ion] with that office?
>
> A No.
>
> (Tr., 8/26/88, p. 65; p. 70)

(13) The commission's description of Wrigley's Wisconsin advertising as "non-incidental" seems to be a reference to the MTC guidelines which state that immunity is lost by activity "unrelated to solicitation," and set forth, as examples of *immune* advertising the following:

> 1. Advertising campaigns incidental to missionary activities.
>
> ****
>
> 5. Incidental and minor advertising, i.e., notice in newspapers that a salesman will be in town at a certain time.

Neither the guidelines nor the commission's decision otherwise elucidate the difference between "incidental" and "non-incidental" advertising.

(14) *Cf. United States Tobacco Co. v. Commonwealth*, 478 Pa. 125, 389 A.2d 471, cert. den. 439 U.S. 880 (1978) and *Coors Porcelain Company v. State*, 517 P.2d 838 (Colo. 1973), cert. den. 419 U.S. 874 (1974) with *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), appeal dism. 454 U.S 1131 (1982), *Olympia Brewing Co. v. Department of Revenue*, 266 Or. 309, 511 P.2d 837 (1973), cert. den., 415 U.S. 976 (1974), and *Clairol, Inc. v. Kingsley*, 109 NJ Super 22, 262 A2d 213, aff'd, 57 NJ 199, 270 A2d 702 (1970), appeal dism., 402 U.S. 902 (1971).

(15) The department contends that the statute should be interpreted in accordance with the rule that tax exemptions are to be strictly construed against the taxpayer, citing *Comet Co. v. Department of Taxation*, 243 Wis. 117, 123, 9 N.W.2d 620 (1943), and *MilwauKee E. R. & L. Co. v. Tax Commission*, 207 Wis. 523, 536, 242 N.W. 312 (1931). There are

two problems with this approach. The first is that 15 U.S.C. sec. 381 is not an "exemption" conferred by the legislative body having power to impose the tax in the first place; it is an *immunization* from state taxation, in the form of a prohibition against the exercise of state power to tax, decreed by the legislative body having exclusive power under the United States Constitution to regulate interstate commerce. Second, a "strict construction against the taxpayer" would vary, depending on whether the particular taxpayer is a foreign corporation, as here, asserting that its acts in this state were no more than immunized solicitation, or a Wisconsin taxpayer asserting in a "reverse nexus" case that its acts in another state exceeded solicitation, thus giving that state jurisdiction to tax an allocable portion of its total net income. Wisconsin's commission has enunciated a policy, which would seem to comport with constitutional principles as well, that it will "apply the same standards in determining 'nexus' with other states in 'throw back' [reverse nexus] situations as in determining foreign corporation's nexus with Wisconsin" in cases involving the application of 15 U.S.C. sec. 381. *Grande Cheese Company v. Wisconsin Department of Revenue*, Wis. Tax Reptr. [CCH] para. 202-595, at 12,781.

(16) *Herff Jones Co. v. Tax Com.*, 410 P. 2d 233 (Or. 1966).

(17) *Iron Fireman Co. v. Tax Com.*, 445 P.2d 126 (Or. 1967), cited in *Miles Laboratories, Inc. v. Department of Revenue*, 546 P.2d 1081, 1083 (Or. 1985).

(18) It is not clear whether Washington actually sought to impose a tax on the net income Miles claimed was taxable in that state. The Oregon Supreme

Court stated at the outset that the issue was "whether a portion of plaintiff's income *would be taxable* by the state of Washington, on the portion of its income derived from its Washington activities, *if that state had tax statutes similar to Oregon's statutes*," and footnoted an Oregon statute under which Miles was "taxable" in Washington if Washington has jurisdiction to levy a tax upon plaintiff's net income "regardless of whether, in fact, the state does or does not." 546 P.2d at 1081-82; italics supplied. At the conclusion of its opinion it noted that it was unnecessary to consider Mile's "contention that because it pays a corporate license and franchise tax to the state of Washington it is entitled to apportion its income under" the same statute. 546 P.2d at 1083. It seems likely that the court's resolution of the case made it unnecessary to consider whether Miles' payment of Washington franchise taxes under statutes dissimilar to those in Oregon entitled it to allocate income under Oregon law.

(19) *See, eg., Hervey v. AMF Beaird, Inc.*, 464 S.W. 557 (Ark. 1971) (regular checks of customers' inventories *itself* extends beyond scope of solicitation of orders where goods were held by customer under consignment contract, since: "[e]ven if it should be said that this activity helped to produce orders, it is equally reasonable to conclude that Beaird's interest was in protecting its property rights in the items shipped to the various parties with whom it had contracts, to establish the basis for billing these parties, and to determine whether conditions in any particular instances required invocation of rights reserved in the various contracts." 464 S.W.2d at 562.); *Sjong v. State Dept. of Revenue*, 622 P.2d 967 (Ala. 1981) (non-resident crab fisherman who neither solicited nor placed orders within Alaska, but who both delivered to

Alaska purchasers from outside the state *and sold tangible personal property within the state* was subject to taxation by Alaska since, in order to qualify for "exemption" under federal statute, "business activities must conform strictly to the language of the statute." 622 P.2d at 975); *Chattanooga Glass Co. v. Strickland*, 261 S.E.2d 599 (Ga. 1979) (glass bottle manufacturer whose representatives remedied customer complaints about previously-purchased products, and which both purchased broken glass from customers in Georgia as raw material for production in another state and maintained storage containers in Georgia for collection purposes exceeded solicitation immunity by activities non-incidental to sales. 261 S.E.2d at 601).

(20) Coors was a Colorado manufacturer of porcelain and ceramic products which it sold in 19 states through ten field representatives, all of whom were trained specialists in ceramics, and all of whom had "business offices" outside Colorado in states where the products were sold and the salesmen resided. In this "reverse nexus" case, the Colorado Supreme Court upheld the lower court's determination that all of the corporation's income was taxable in Colorado because none of the following activities exceeded solicitation: demonstrating Coors products; designing parts to be manufactured by Coors for a particular customer; recommending designs to customer's engineers to solve particular customer problems; presenting price quotations and negotiating prices; discussing with customers any complaints or problems regarding purchased products; *on occasion* possessing Coors products for shipment to the customer and retaining Coors

products rejected by the customer. 517 P.2d at 839-40. The court said:

> From the stipulated facts, the only possible extension by Coors' out-of-state representatives beyond the solicitation of orders is the statement that "on occasion they possessed Coors products for shipment to the customer and also retained Coors products which have been rejected by the customer [upon] delivery. It appears that these acts are not in common practice and are the exception rather than the rule. 517 P.2d at 840.

(21) Ciba was a New Jersey manufacturer of prescription drugs sold in all fifty states to retail druggists and wholesale pharmaceutical companies. Its twelve "professional service representatives" in Missouri solicited orders from Missouri druggists and also assisted pharmacists in taking inventory, "operated" from their homes in Missouri, assembled periodically in motel rooms for sales meetings "of an educational nature," and called on doctors to explain products in an effort to induce doctors to prescribe Ciba products to patients. 382 S.W.2d at 651-52. In holding that these activities did not exceed the protection of 15 U.S.C. sec. 381, the court said:

> We find nothing in the facts. . .to indicate any business or financial transactions took place when the representatives "detailed" the doctors, or when they distributed free samples, or when they gave out literature, or when the representatives met together[.] [T]hese were not business transactions where finances were involved or taxable income produced or any intrastate commerce involved. The only financial transactions were between respondent

> and the druggists or the hospitals that order drugs, and that is in interstate commerce. 382 S.W.2d at 652.

***

> In adopting Public Law 86-272 Congress is clearly, in our opinion, undertaking to regulate interstate commerce by providing a uniform statement of the facts, circumstances and conditions under which a state may not burden interstate commerce by state income taxes. . . .
>
> Respondent distributes its products into all of the fifty states and every state that seeks to levy an income tax on any such foreign corporation doing interstate commerce within its boundaries necessarily imposes an income tax under a different statute. The determination of the amount of the tax due each state and whether the amount bears a proper relationship to the particular activities carried on in each of the taxing states would alone impose a heavy burden, hindering and limiting interstate commerce. 382 S.W.2d at 657.

(22) In *Miles, supra*, 546 P.2d at 1082, the stipulated facts included the fact that Miles "has spent $649,200 for television advertising in Washington." This fact was not mentioned by the court, whose determination that immunity had been lost rested solely on representatives' acts of replacing damaged goods and arranging displays. 546 P. 2d at 1083. Similarly, the appellate court in *Clairol, supra*, 262 A.2d 213, did not mention in its opinion the facts found by the tax agency, whose findings were appended to the New Jersey Supreme Court's per curiam affirmance of the appellate court's opinion,

270 A.2d 702, as to Clairol's substantial national advertising or its partial reimbursement to retailers who advertised its products. In *Drackett, supra*, 370 N.W.2d at 725, the court noted as undisputed the fact that Drackett's resident salesman "assisted wholesalers with arrangements for providing newspaper advertising copy to the retailers," but did not deem that fact sufficiently significant to mention in its determination that "a number of" the company's ongoing activities exceeded solicitation. 370 N.W.2d at 726.

(23) Commissioner Bartley's dissenting opinion, at p. 26, states:

> No one can seriously maintain that advertising is something fundamentally different from solicitation. In fact, it really is solicitation itself. Advertising is "any oral, written, or graphic statement made by the seller in any manner in connection with solicitation of business. . . ." [Quoting *Black's Law Dictionary*, Fifth Ed. at 50.]

(24) *See Ciba, supra*, 381 S.W.2d at 648 (sales representatives "operate from their homes") and 652 (representatives "assemble periodically for sales meetings. . .usually in motel rooms"); *Clairol, supra*, 270 A.2d at 703 (although representatives not required to use home space for business purposes, business card gives home address and telephone number of representative); *Cal-Roof Wholesale, supra*, 410 P.2d at 234 (salesman maintained "no office except for his home"); *Coors Porcelain Company, supra*, 517 P.2d at 839 (salesmen reside in and maintain their business offices outside the State of Colorado and in states where Coors products are sold"); *Kimberly-Clark, supra*, 416 N.E.2d at 1266 ("each salesman worked from his

home"); *Smith-Kline, supra*, 403 P.2d at 376 (each salesman maintains stocks of samples at home, business cards carry home number).

(25) *Cf., Robbins v. Shelby*, 120 U.S. 489, 30 L.Ed. 694 at 696 (1886): "[A] State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose especially if connected with interstate commerce." This was a part of the established constitutional doctrine with respect to travelling salesmen or "drummers" which *Portland Cement, supra*, 358 U.W. 450 (1959) was viewed as having unsettled, thus leading to the enactment of 15 U.S.C. sec. 381. *U.S. Tobacco Co. v. Com., supra*, 386 A.2d 471, 481.

(26) See Commissioner Bartley's dissent, pp. 13-16 of Decision and Order on Remand, concluding that, even assuming the applicability of the agency's 1979 nexus regulations covering home offices, the requirements of those regulations were not fulfilled by the facts of this case.

(27) *Cf.*, Commissioner Bartley's dissent, p. 14 of Decision and Order on Remand: "Wisconsin-based salesmen should not be required to leave our state and travel to garden spots like Waukegan, Illinois, to talk business."

(28) The department also cites *Ringgold Coal Mining Co. v. Taxation Division Director*, N.J. Tax Rptr. [CCH] p. 201-011 (April 29, 1982), as additional support. In that case, a New Jersey tax court judge, following *Clairol, supra*, noted as one of several activities through which the corporation was held to have forfeited immunity under the federal statute the undetailed supervisory activities of its corporate vice president. The case is not on point

with the facts of this case, and its reasoning is not persuasive.

(29) *See, e.g.*, testimony of Regional Manager Kroyer at Tr. 8/27/85, pp. 17-19.

(30) *Indiana Dept. of Revenue v. Kimberly-Clark Corp., supra*, 416 N.E.2d 1268, *Coors Porcelain Company v. State, supra*, 517 P.2d at 843; *Drackett Products Co. v. Conrad, supra*, 370 N.W.2d at 723.

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611	*	DOCKET NO. I-8591
Petitioner,	*	**DECISION AND ORDER**
vs.	*	**ON REMAND**
WISCONSIN DEPARTMENT REVENUE OF P.O. Box 8933 Madison, WI 53708	*	
Respondent.	*	

THOMAS R. TIMKEN, COMMISSIONER:

The above-entitled matter has been remanded to this Commission by a Decision and Order issued on August 20, 1987 by Dane County Circuit Judge Michael Nowakowski. In his Decision and Order, Judge Nowakowski instructed this Commission to consult personally with former Commissioner William Bradford Smith concerning his

impressions of the credibility of certain witnesses and the weight to be accorded their testimony.

This Commission took the following steps in compliance with this remand order:

(1) The entire Commission file in this matter was provided Commissioner Smith for his perusal and review.

(2) Mr. Smith was invited to and attended executive sessions of this Commission held on September 21, 1987 and October 12, 1987 while all (5) members were present.

(3) Mr. Smith's views were solicited as to the credibility of the testimony of Gary Hecht and John Kroyer and the weight to be accorded that testimony.

(4) Mr. Smith advised the Commission that he found the testimony of Gary Hecht and John Kroyer to be "extremely credible" and would accord it great weight.

After consultation with former Commissioner William Bradford Smith, the majority of this Commission reaffirms its Decision and Order of November 18, 1986.

The credibility of Messieurs Hecht and Kroyer, both witnesses called by petitioner William Wrigley Jr. Company, as well as the other witnesses who testified, was never questioned or in issue by this Commission. That testimony was completely accepted and accorded substantial weight. Although the company job descriptions of both Hecht and Kroyer called for them to participate in credit transactions, it is clear and uncontroverted from their testimony that Gary Hecht, regional manager from 1976 to 1978, had no involvement of any kind in credit transactions with Wrigley customers while John Kroyer, regional manager from 1973 to 1975, did.

This Commission never believed or concluded or intended to intimate that Gary Hecht or any other witness lied or was in any way untruthful.

Although the credit transaction was highlighted in its Opinion, this Commission did not rest its decision on that

basis alone but rather relied on the totality of all the different non-immune activities specified at page 25 of its Opinion, including the credit activities in 1973 to 1975 as well as the maintaining home offices and conducting regular and periodic training seminars in Wisconsin, which findings were based on the unimpeached, credible testimony of petitioner's own witnesses which are supported by the record.

Therefore,

IT IS HEREBY ORDERED

That this Commission's Decision and Order of November 18, 1986 be and the same is hereby affirmed.

Dated at Madison, Wisconsin, this 25th day of November, 1987.

WISCONSIN TAX APPEALS COMMISSION

(Not Participating)
Kevin C. Potter, Chairperson

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

/s/ John P. Morris
John P. Morris, Commissioner

/s/ Robert C. Junceau
Robert C. Junceau, Commissioner

(Dissenting)
Douglass H. Bartley, Commissioner

pc: Petitioner
Representative
Respondent

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**

DISSENTING OPINION

DOUGLASS BARTLEY, COMMISSIONER:

Pearl Buck once said, "Every great mistake has a halfway moment, a split second, when it can be recalled and perhaps remedied." The remand of this case was our halfway moment, our chance to recall the original decision in this case -- a decision I believe to have been an errant shot that wounded legally-protected salesmanship.

When the Commission originally decided this case, it held that petitioner's activities in the state were sufficient to give the state jurisdiction to tax petitioner's income.[1] Adopting the statement of guidelines of the Multistate Tax Commission,[2] the Commission reasoned that petitioner's activities in this state exceeded the levels of activity the guidelines permit a business to conduct in a state without subjecting itself to the state's taxing jurisdiction.

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[1]CCH Wis. Tax Rep., ¶202-792.

[2]"Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272", adopted as a Resolution on June 21, 1985. The statement is set forth at CCH Wis. Tax Rep., ¶350a.

What troubles me about the decision is that the guidelines were not then and not now the law of this state, Wisconsin never having signed the statement of guidelines or otherwise adopted them. Moreover, the statement of guidelines didn't even come into existence until 1985, some seven years after the last tax year involved in this case. The Commission nonetheless adopted the guidelines, an action which in my opinion was beyond its authority.[3] Regrettably, the majority has perpetuated that error by today reaffirming that decision.

Before discussing what I believe would have been the correct approach to the case, I should like first to review the procedural history and the facts.

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[3]The Commission is a judicial or quasi-judicial body whose powers are limited to resolving questions of law and fact arising under the tax laws of Wisconsin. Section 73.01 Wisconsin Statutes. Thus it has no legislative powers. In resolving these disputes, the Commission must apply applicable law. Since Wisconsin did not adopt the guidelines, it's hard to see how the Commission can incorporate them into our law.

I.

PROCEDURAL HISTORY

This case came before us originally on petitioner's timely appeal of respondent's assessment of $246,641.04 in taxes, interest, and penalties for the years 1973-78. The Commission sustained the assessment of taxes and penalty, but reversed the assessment of interest at the delinquent rate.[4] Commissioner William Bradford Smith heard the case, but his term of office ended before the decision was rendered, and he neither participated in the decision nor was he otherwise involved in it in any way.

In the decision, the Commission held that Wisconsin had jurisdiction to tax petitioner because petitioner's activities in the state went beyond immune solicitation and thus fell outside the perimeter of jurisdictional protection afforded by federal law.[5] Grounding its decision on the guidelines mentioned above, the Commission cited various

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[4]CCH Wis. Tax Rep., ¶202-792.

[5]P.L. 86-272 is set forth at note 17.

activities which occurred in Wisconsin as compelling the holding that the state had jurisdiction:

1. replacement of stale gum
2. maintaining product displays both as to location design and content
3. direct sales of gum * * *
4. maintaining offices in home
5. conducting regular and periodic training seminars in Wisconsin
6. recommending hiring, firing and release of sales representatives in Wisconsin by regional manager
7. involvement in credit transactions by regional manager
8. training and supervising sales representatives by regional sales manager
9. rental of storage space in Madison, Wisconsin
10. the purchase of non-incidental advertising in Wisconsin[6]

In reaching its ruling, the Commission emphasized its finding that petitioner's Wisconsin-based regional manager was involved in credit activities. That involvement, said the Commission, "alone clearly exceeds the 'solicitation of orders'."

Petitioner appealed the Commission's ruling, and the case is before us now on remand from Dane County Circuit Court, the Court having held the Commission's decision to

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[6]CCH Wis. Tax Rep., ¶202-792.

be legally flawed because Commissioner Smith was not consulted on certain evidentiary questions of credibility, weight, and inference relating principally to the testimony of one of petitioner's witnesses, its Wisconsin regional manager Gary Hecht.[7] Hecht, who served on that job in 1976-78, had testified that he was not during that time involved in any credit matters, and the Judge observed that there was nothing in the record to support the Commission's implicit finding that Hecht participated in any such activities "other than to have concluded that [he] was lying."[8]

In remanding the case, Judge Nowakowski ordered the Commission to "consult personally with Mr. Smith concerning his impressions of the credibility of the witnesses and the weight to be accorded their testimony" and to reconsider the case in light of his impressions.[9]

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[7]Memorandum of Decision and Order, Case Nos. 86-CV-6679 and 86-CV-6796, Dane County Circuit Court.

[8]Id. at 5.

[9]Id. at 10-11.

The Commission has conferred with Mr. Smith on several occasions, and it is his conclusion that Hecht's testimony was "extremely credible."

II.

FACTS

Petitioner, an Illinois corporation headquartered in Illinois, manufactured and sold chewing gum throughout the country. It had substantial sales in Wisconsin, but, on the advice of counsel, neither filed Wisconsin franchise tax returns nor paid any franchise taxes here in any of the years under review.

Petitioner's Wisconsin sales operations were directed by a regional manager who lived and worked in the state. The regional manager's activities here included supervising the four or five salesmen working the state, evaluating their performance, recommending raises for them, recommending the hiring and firing of them, supervising their on-the-job training, reviewing their sales reports, substituting for them when they were ill, and

reapportioning sales districts. The regional manager was not reimbursed by petitioner for the expense of his office but was reimbursed for various other business-related expenses.

From 1973 through 1975, John Kroyer was the regional manager. Mr. Kroyer maintained an office in his home where he held one sales meeting a year, and kept files, display racks, promotional literature, and a stock of gum. Two to three times a year, to protect future sales, Mr. Kroyer would intervene in credit disputes between a customer and petitioner's credit department. Once a year Mr. Kroyer would have a sales meeting in his home, and once he held a sales meeting in a Madison hotel. But his successor, Gary Hecht, who served during the years 1976-78, was not involved in any credit matters, nor did he hold any sales meetings in his home.

The salesmen's activities here included calling on customers or prospects, setting up displays and maintaining them, checking customer inventories of gum for freshness, and replacing stale gum. Each salesman had

a supply of gum, display racks, and promotional literature which, with one exception, were stored in his residence. One salesman kept his supplies in storage in Madison paid for by petitioner. All the salesmen used vehicles supplied by petitioner, which petitioner either leased or owned. All were reimbursed for various expenses incurred in the course of their activities.

In almost all cases, the orders solicited by the salesmen were submitted to petitioner's headquarters in Illinois for approval or rejection. If approved, the orders were then filled by shipping the gum from Illinois to the customer in Wisconsin by common carrier. Occasionally, however, on the average of once a month, each salesman sold $8 to $16 (of retail value) of gum directly from his own supply.

During the years in question, petitioner through a Chicago agency purchased extensive print and broadcast advertising seen or heard in Wisconsin.

III.

LAW

As noted at the outset of this opinion, the guidelines of the Multistate Tax Commission are not and never have been a part of our law. Thus we must turn to our own law for guidance. But first let us restate the issue.

The issue is whether Wisconsin, by virtue of petitioner's activities in the state during the years 1973-78, had jurisdiction to impose a franchise tax on petitioner for those years? Or was petitioner immune from taxation because its activities constituted protected solicitation under federal law limiting the jurisdiction of states to tax the income of foreign corporations?

To determine whether any of petitioner's activities in Wisconsin constituted a jurisdictional basis for the state to tax petitioner, we must apply the jurisdictional rules embodied in our law construed *in pari materia*[10] with the

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[10]Sutherland, *Statutory Construction*, sec. 51.06, citing *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 193 Wis. 538 (1927).

jurisdictional limits imposed on states by the federal law, P.L. 86-272.[11]

Unfortunately, Wisconsin's jurisdictional statute doesn't give us much specificity on what business activities give the state taxing jurisdiction over foreign corporations.[12] So, for the time being, we must look beyond the statute.

There are some jurisdictional rules contained in state regulations which were cited by respondent and either accepted or not contested by petitioner.[13] Here again we have a problem--one that neither side explained. The problem is that the regulations weren't created until

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[11]P.L. 86-272 is set forth at note 17.

[12]Section 71.07(2), set forth post at ___, requires that a foreign corporation must be "doing business" in the state for the state to have taxing jurisdiction.

[13]Respondent in its brief cited certain portions of Section Tax 2.82(4) of the Wisconsin Administrative Code. Petitioner referred to several of these sections in its brief without contesting their applicability and did not mention the other sections.

1979,[14] which was the first year after the last tax year under review in this case.

Because the regulations weren't in effect during the years involved, one wonders how they have a bearing on this case. But because the parties evidently agreed they were relevant and because it's possible, perhaps likely, that the rules codified settled practices, policies or interpretations of the department, I believe it proper, indeed necessary at this point, that they be considered as a manifestation of law applicable to this case.[15] I would have asked the parties to brief the issue of applicability, but such is not the prerogative of one in lone dissent. Thus I proceed unenlightened on this important question -- with all due disclaimers to those who require

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[14]Section Tax 2.82 was created in January 1979.

[15]Considerable weight is accorded an agency's construction of a statute. *City of Milwaukee v. DIHLR*, 106 Wis. 2d 254 (1982). My research has been singularly unfruitful in determining whether the regulations had any sort of official standing before they were created. But because they were accepted by both sides, I think it proper to give them weight as a codification of prior agency practices.

solid legal footings upon which the reason toward result is built and to those who disdain somewhat speculative exercises. Ahead in this opinion I will try to bridge any regulatory gap by assuming that the regulations in question did not exist and attempt to analyze the case on a purely statutory basis.[16]

The regulations involved are contained in Section Tax 2.82(4) of the Wisconsin Administrative Code:

"(4) WHAT CONSTITUTES 'NEXUS.'

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

* * *

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them * * *.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity * * *.

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[16]Post at ___.

8. Miscellaneous other activities by employees or representatives in Wisconsin such as credit investigations, collections of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property * * * for use in Wisconsin."

The other source of applicable law we must consider is Public Law 86-272 which provides that if a foreign corporation's only activities in a state are soliciting orders for goods which are accepted and filled outside of the state, the state has no jurisdiction to tax the net income of the corporation.[17]

Here our task is to decide whether under our regulations, construed with references to the overriding

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[17]P.L. 86-272 is set forth at 15 USC Section 381:

"No State * * * shall have power to impose * * * a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year * * * [constitute] * * * the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a [footnote ends].

federal jurisdictional limits on states, any activities conducted or sponsored by petitioner in Wisconsin produced a lawful nexus of jurisdictional power.

A.

Maintenance of a business location

We deal first with Section Tax 2.82(4)(a)(1), ante at ___. Respondent argued that because petitioner's sales manager and salesmen had offices in their residences, the state gained jurisdiction to tax petitioner.

A reading of that regulation, standing by itself, does not suggest such a result, for explicit in the preface to its text is the precept that the corporation involved must itself have had the business location or office. Here the employees, not the corporation, had the offices.

Respondent pointed out that there is another applicable regulation on this issue, namely Section Tax 2.82(1)(b):

"A residence of an employe * * * is not ordinarily considered a business location unless the facts indicate otherwise. It *could* be

> considered a business location under one or more of the following conditions:* * * the employee uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to * * * hold sales meetings * * *." (Emphasis added.)

Because the regional manager at one time conducted sales meetings in his in-residence office, that office, respondent contended, gave Wisconsin jurisdiction to tax petitioner.

I must reject this argument for three reasons.

First, the regulation is directory, not mandatory.[18] The use of the word "could" leads me to believe that the draftsmen intended a judicious, not a mechanical, application of the regulation. I think the word "could" was intended as a signal that no one of the enumerated activities, or even a combination of them, was to result in an automatic finding of jurisdiction. The intent, I believe, was to indicate that the totality of circumstances must be

[18]Ordinarily, the use of a permissive term such as 'could' carries no mandate. Sutherland, *Statutory Construction*, sec. 57.03.

weighed in determining when an employee's home office becomes his employer's business location.

Weighing all the circumstances, I conclude the residential offices were not nexus-creating. It is here significant that petitioner's employees were not reimbursed for the costs of having offices, and that neither the employees nor petitioner held the residential offices out as being Wrigley offices. Also it's hard to believe that the draftsmen intended to, in effect, outlaw sales meetings in this state. Wisconsin-based salesmen should not be required to leave our state and travel to garden spots like Waukegan, Illinois, to talk business.

Second, normal rules of statutory construction mandate an interpretation inconsistent with respondent's argument. It's a cardinal principle of our law that statutes which purport to impose a tax must contain clear and express imposition language, and ambiguity and doubt must be resolved in favor of the putative taxpayer.[19] That

[19]*Wisconsin Department of Revenue v. Milwaukee Mutual Insurance Co.*, 105 Wis. 2d 705 (App. 1981).

principle, in my opinion, applies *a fortiori* when the tax imposition language is imposed by a mere regulation, promulgated by the taxing authority itself. Here the use of the word "could" casts great doubt on the meaning of the regulation. It gives little guidance to anyone as to what is proscribed and what is not. Borrowing from Southey, one might say that the regulation is "a perfect nonplus and a baffle to all human understanding." But perhaps it's better to say that even when read in the best light possible, the regulation's meaning remains enshrouded in vapors and mists of ambiguity.

Third, even if given a broad construction, in sweep the regulation goes far beyond what federal law allows as a nexus for state jurisdiction. P.L. 86-272 says that a state can't gain jurisdiction over a business just because its salesmen solicit in that state.[20] I believe that protected solicitation includes not only the precise act of attempting to secure a sale, but also all other activities necessary or proper for the solicitor to peddle his wares. If the end be

[20]See note 17.

protected, all reasonable and proper means toward that end must also be protected. A salesman's office in his residence falls in the category of a proper ingredient of the selling itself. Even the smoothest-talking purveyor of the highest quality snake oil needs a retreat to reflect on strategy, to rehearse tactics, and to inculcate and motivate assistants.

For these reasons, I conclude that the residential offices of petitioner's employees did not give the state jurisdiction.

B.

Usual or frequent direct sales

We deal next with Section Tax 2.82 (4)(a)(5), ante at ___, which gives the state jurisdiction when salesmen make "usual or frequent" sales on the spot, in contradistinction to having the sales accepted by out-of-state personnel. Here petitioner's salesmen, on the average of once a month, sold $8-$16 worth of gum on their own -- that is, by their direct acceptance of customer orders. Respondent

seemed to argue that these direct sales were usual and frequent and gave the state jurisdiction.

Again I must disagree. Although there is no question that the sales were direct, I conclude that such sales can only be characterized as unusual and infrequent because they were but a pittance. For example in 1978, direct sales amounted to at most $600, or 7/100,000 of one per cent of Wrigley's $4,392,202 of Wisconsin sales that year. Looking at this in a slightly different perspective, direct sales of Wrigley's gum were barely enough to supply three avid, two-pack-a-day chewers with enough Juicy Fruit to last through the year. That's not enough gum to stick jurisdiction on Wrigley even if the chewers are doubling their pleasure.

C.

Leasing of cars for use in Wisconsin

Respondent also argued that petitioner's leasing of cars for use by the salesmen in Wisconsin gave the state jurisdiction to tax petitioner under Section Tax 2.82

(4)(a)(9), ante at ___. There are a number of difficulties with this approach.

First, my reading of the regulation is that it refers to a taxpayer who is a lessor in the business of leasing personal property which is used in Wisconsin and not to the situation, as here, where the taxpayer is simply a lessee of property that finds its way into Wisconsin.

Second, even if my reading above is wrong, the regulation still did not give jurisdiction. A full review of the regulation, including the prefatory text, requires not only a finding that the cars were used in Wisconsin, but also that they were leased in Wisconsin by Wrigley. The record is silent on where the cars were leased, and we cannot simply presume that Wrigley consummated the lease in Wisconsin. In fact, a more reasonable inference would be that the lease was consummated through Wrigley's corporate headquarters in Illinois.

Third, as with the business location regulation, even if given a broad construction, the leasing regulation would contravene P.L. 86-272 in that its jurisdictional swath is

too wide. A travelling salesman's car is obviously necessary to his solicitations. It's something without which few sales could be made, and as such, part and parcel of the protected solicitation itself.

D.

Purchasing activity

Respondent argued that Wrigley's advertising seen or heard in Wisconsin created nexus. Respondent, in making this argument, was apparently[21] relying in part on Section 2.82(4)(a)(6), ante at ____, which creates nexus when there is "[u]sual or frequent activity in Wisconsin by employees or representatives engaged in a purchasing activity * * *."

This argument fails for the same reason respondent's argument about leasing cars failed -- the nexus creating activity must be shown to have occurred in Wisconsin.

[21]I say "apparently" because respondent cited the purchasing activity regulation as part of the law governing the case but doesn't specifically discuss it in relation to any specific activity of petitioner or its employees.

Here, the record shows that the purchasing of the advertising was not physically accomplished in Wisconsin -- it was all done through a Chicago agency.

E.

Miscellaneous activities

Thus far we have concluded that neither the offices-in-home, nor the direct sales, nor the leased cars, nor the advertising were enough to have given the state jurisdiction to tax petitioner. I now consider whether any of petitioner's remaining activities caused the state to have gained jurisdiction.

The activities which I have grouped under this heading are the salesmen's replacement of stale gum, maintenance and location of display cases, the keeping of a stock of gum, display racks, and promotional literature, one salesman's rental of storage space for such supplies, one regional manager's holding of annual sales meetings in his home and one meeting in a hotel and his intercession in credit

disputes, and both regional managers' supervision of their salesmen.

I have collected these activities under the heading "miscellaneous activities" because there seems to be no other asserted basis for the state's invoking jurisdiction here, and respondent in its brief cited the nexus catch-all regulation, Section Tax 2.82(4)(a)(8), ante at _____, as being a relevant factor for us to consider.

To determine whether any of these activities constitute "miscellaneous other activities by employees or representatives in Wisconsin" conferring nexus on Wisconsin, we must ascertain the meaning of these general words by resorting to rules of construction.

The rule which applies here is *ejusdem generis*, a maxim which posits that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.[22] That's

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[22]Sutherland, *Statutory Construction*, sec. 47.18. The maxim "rests on practical insights about everyday language usage. (continued...)

precisely the situation with Section Tax 2.82(4), which is an enumeration of a class followed by the general words "miscellaneous other activities". The application of *ejusdem generis* thus means that "miscellaneous other activities" cannot be construed to their widest extent but must be limited to those activities of the same kind or character as the specifically enumerated activities.

A review of the full text of the regulation is necessary to define the common denominator of the enumerated class:

"(4) WHAT CONSTITUTES 'NEXUS.'

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

2. Ownership of real estate in Wisconsin.

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[22](...continued)
When people list a number of particulars and add a general reference like 'and so forth', they mean to include by use of the general reference not everything else but only others of like kind." Id.

3. Ownership of a stock of goods in a public warehouse or on consignment in Wisconsin.

4. Ownership of a stock of goods in the hands of a distributor or other non-employe representative in Wisconsin, if used to fill orders for the owner's account.

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity or in the performance of services (including construction, installation, assembly, repair of equipment).

7. Operation of mobile stores in Wisconsin (such as trucks with driver-salespersons), regardless of frequency.

8. Miscellaneous other activities by employees or representatives in Wisconsin such as credit investigations, collections of delinquent accounts, conducting training classes or seminars for customer personnel in the operation, repair and maintenance of the taxpayer's products.

9. Leasing of tangible property and licensing of intangible rights for use in Wisconsin.

10. The sale of other than tangible personal property such as real estate, services and intangibles in Wisconsin.

11. The performance of construction contracts and personal services contracts in Wisconsin."

Considering just the enumerations contained in the regulation on miscellaneous nexus activities, and applying *ejusdem generis* to identify a common denominator, we see that none of the listed items (credit investigations, collections, and repair and maintenance seminars) can be characterized either as selling in general or as selling as it was done in this case. The common denominator of the class of enumerations is that they are all non-selling activities -- functions that salesmen would not normally undertake. Thus, within its own framework of enumerations, the regulation covering miscellany cannot be construed as including sales-related activities.

Considering the regulation *in toto*, and reading it in connection with the prefatory language, one is left with the strong impression that the common characteristics of the enumerated activities is that each involves a substantial non-selling business presence within the borders of this state -- a presence beyond one principally motivated by the sale of goods accepted and filled outside the state. The dominant theme of the enumerations, taken as a whole, is

to establish a class of activities that are non-solicitory in nature.

Because none of the activities undertaken here by Wrigley or the employees is explicitly or implicitly addressed by the enumerated nexus factors of the regulation, I conclude that none can be sucked into the jurisdictional black hole of nexus miscellany. On the contrary, the activities are by nature part of solicitation. The replacement of stale gum, the maintenance and location of sales displays, the keeping of a stock of gum for samples and minuscule spot sales, the promotional literature, the storage of sales supplies and materials, the sales meetings, the supervision of salesmen, and even the intervention in the credit disputes all had in common one purpose -- the stimulation of sales. Therefore none of these activities can be characterized as non-solicitory, and none meets the required common denominator of the class.

F.

The statute

Having concluded that none of the Wisconsin nexus regulations operates to give the state jurisdiction here, I now consider whether the statute itself confers taxing jurisdiction on the state. As I mentioned earlier, we need to come to terms with this because of the possibility that the nexus regulations, or the principles in them, were not in effect during the tax years involved in this case.

The only statutory treatment of the subject of jurisdiction is contained in Section 71.01(2) of the Wisconsin Statutes.

> "For the privilege of * * * doing business in the state in a corporate capacity * * * every * * * foreign corporation * * * shall annually pay a franchise tax * * *."

Superimposed on the Wisconsin jurisdictional requirement of doing business are the jurisdictional limitations on states contained in Public Law 86-272 which, as we have noted, says that if a foreign corporation's only activities in a state are soliciting orders

for goods which are accepted and filled outside of the state, the state has no jurisdiction to tax the net income of the corporation.[23] Reading the federal jurisdictional limitation into the Wisconsin statute produces a statute which would read (somewhat condensed) something like this:

> "For the privilege of * * * doing business in this state in a corporate capacity * * * every * * * foreign corporation * * * shall annually pay a franchise tax * * *. The term "doing business" in the preceding sentence shall not be construed to include the solicitation of orders for sales of goods that are accepted, and filled from, outside this state."

Did the statute, as so amended, give the state jurisdiction? Breaking the question down further, did any of petitioner's activities in the state constitute something more than soliciting orders which were accepted and filled outside Wisconsin? As we shall see, for all but one activity (direct sales), the question boils down to one of what is solicitation?

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[23]P.L. 86-272 is set forth at note 17.

Let's reconsider petitioner's activities, this time measuring them against the bare statute.

1.

Maintenance by employees of offices-in-home

The point here is one I touched on in the discussion concerning the regulation, namely that solicitation includes not only the end of securing a sale, but also all the necessary or proper means to that end.[24] Because a salesman's office is a reasonable means of organizing himself for the actual solicitation itself, the office is protected to the same degree the solicitation itself is protected. Thus, offices-in-home pass the statutory jurisdictional test also.

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[24]Ante at ___.

2.

Direct sales by salesmen

As a group, Wrigley salesmen in 1978 sold about $600 of gum directly to their customers -- that is, without having the sales first approved by out-of-state personnel. Under the regulation, I concluded that such sales did not create nexus because they were unusual and infrequent.

But if the statute is our sole guide, obviously here we have an immediate problem because the statute, as modified by the federal law, doesn't make any exception for unusual or infrequent direct sales. Without more, one is tempted to conclude that the direct sales may have broken the jurisdictional barrier.

However, there is a federal guidepost existing which persuades me that unusual or infrequent direct sales probably did not result in jurisdiction. A congressional subcommittee in a study of P.L. 86-272 considered "usual or frequent activity in a state by employees soliciting orders with authority to accept them" to be an

"[u]nprotected or taxable" activity.[25] (This language is identical to the Wisconsin regulation.) As applied to this case, I take this language to mean that the committee felt that unusual or infrequent direct selling was not enough to create nexus. But here is another area on which briefs on the weight to be given to this seemingly authoritative pronouncement would have been helpful.

3.

Leasing of cars

The analysis here again parallels the earlier point that a travelling salesman's car is a necessary tool of solicitation and thus the legal equivalent of statutorily-protected solicitation.[26]

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[25]The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee studied P.L. 86-272. See CCH State Tax Guide, ¶115.

[26]Ante at ___.

4.

Advertising

No one can seriously maintain that advertising is something fundamentally different from solicitation. In fact, it really is solicitation itself. Advertising is "any oral, written, or graphic statement made by the seller in any manner in connection with solicitation of business * * *."[27]

5.

Miscellaneous activities

The last activities we consider are the same we considered in the earlier discussion of miscellaneous activities--the salesmen's replacement of stale gum, maintenance and location of display cases, the keeping of a stock of gum, display racks, and promotional literature, one salesman's rental of storage space for such supplies,

[27] *Black's Law Dictionary*, Fifth Ed. at 50.

one regional manager's holding of annual sales meetings in his home and one meeting in a hotel and his intercession in credit disputes, and both regional managers' supervision of their salesmen.

As I noted earlier, all of these activities are by nature either an integral part of solicitation itself or are sales tools designed to directly enhance solicitation. As such, none of them should be regarded as falling within the jurisdictional orbit of our statute.

For example, Mr. Kroyer's "credit activities" were really just an incident of solicitation. His credit activities had nothing whatever to do with granting or denying credit or collecting on delinquent accounts. His sole connection with credit was his intervention in credit disputes to protect future sales -- something any good salesman would go. To contend that Kroyer's credit activities served to take away Wrigley's immunity is to punish an employer for having a conscientious employee.

Likewise, the supervisory duties of the regional managers were a necessary part of the solicitation.

Salesmen are, it is true, an independent lot usually capable of finding prospects on their own. But free spirits, left totally free, are almost always less effective than when there is some modicum of order imposed. A sales manager serves that order, giving operations a gravitational pull that creates cohesion in a galaxy of resplendent sales stars.

To say that the credit activities or the management or any of the other sales tools listed above are not part of protected salesmanship is to maintain that saws are not part of carpentry, that medicine is not part of doctoring, that briefs are not part of lawyering -- and that imperiousness is never a part of dissenting opinions.

In sum then, I would have ordered further briefing on whether the regulations represented our jurisdictional rules, and, if not, what were our jurisdictional rules and what was the effect of the congressional study on our statute. In the absence of that briefing, I am compelled to

dissent on the grounds that neither the regulations, nor the statute, gave the state taxing jurisdiction.

Submitted by:

/s/ Douglass H. Bartley
Douglass H. Bartley, Commissioner

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WILLIAM WRIGLEY JR., CO.,

Petitioner-Respondent,

vs.

MEMORANDUM DECISION AND ORDER

Case Nos. 86-CV-6679
86-CV-6796

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Petitioner.

William Wrigley, Jr., Co: (hereafter Wrigley) petitioned in Case No. 86CV6796 for judicial review of a decision of the Wisconsin Tax Appeals Commission (hereafter Commission) which upheld the franchise tax assessment of the Wisconsin Department of Revenue (hereafter DOR) for the years 1973 through 1978. In companion Case No. 86CV6679, DOR petitioned for judicial review of that portion of the Commission's decision which determined that interest on the taxes found due should be calculated

at the simple interest rate under Wis. Stat. 71.09(5)(a) rather than the higher delinquent interest rate under Wis. Stat. 71.13(1)(a). Since both cases arise from the same Decision and Order of the Commission and both have been fully briefed, this Decision will address both matters.

Wrigley challenges the Commission's Order on three grounds: (1) that the failure of the Commission to involve the member who presided at the two-day evidentiary hearing in making its decision violated Wrigley's constitutional right to due process and its statutory rights; (2) that the Commission's decision is not supported by substantial evidence; and (3) that the Commission's decision rests on an improper interpretation or application of controlling law.

The pertinent and undisputed sequence of events relating to Wrigley's first challenge revolves around Commissioner William B. Smith. He was assigned to preside over the hearing held on August 26-27, 1985 and did so. Due to legislative action, his term on the Commission expired in October of 1985. A transcript of the

hearing was prepared and available to the full Commission in reaching its decision. However, the record contains no indication that Smith ever prepared proposed findings of fact, conclusions of law or decision in the case, ever reported to the full Commission regarding the hearing or was ever consulted in any fashion prior to the Commission's entry of its Order of November 18, 1986.

The Supreme Court of Wisconsin has said, "Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." (citations omitted) *Shawley v. Industrial Comm.*, 16 Wis. 2d 535, 541-2 (1962). Here it is undisputed that the Commission did not have the benefit of Commissioner Smith's impressions in making its fact determinations, and thus the crux of the due process challenge is whether the credibility of any witness was at issue in making any material fact determination.

Here Wrigley points to several factual findings in the Commission's Decision and Order where it contends witness credibility was an issue. The only one where this contention is clearly sustained is with respect to the finding of fact at page 10 of the Commission's Decision and Order: "On occasion, several times per year, the regional sales manager interceded in credit matters when a good account was involved." There can be little doubt that this factual determination was material to the Commission's Decision and Order. While the Conclusions of Law relate only the general statement that "The ongoing business activities of (Wrigley) . . . during the years 1973 through 1978 exceeded the 'soliciation of orders' protected by 15 U.S.C. 381 (P.L. 86-272)", the Opinion which explains this conclusion states with reference to the involvement in credit transactions by the regional manager, "This alone exceeds the 'solicitation of orders.'" The determination of whether a foreign corporation's Wisconsin business activities go beyond only the solicitation of orders must be made on a case by case basis. While a single non-immune

activity may form the basis for concluding that the minimum "nexus" with Wisconsin exists, the New Jersey Tax Court decision on which DOR relies so heavily pointed out,

> "Although it may logically be argued that each of Ringgold's activities taken individually may not warrant the conclusion that plaintiff exceeded the minimum threshold established by Sec. 381, *collectively*, plaintiff's activities demonstrate taxable presence." (emphasis added) *Ringgold Coal Mining Co. v. Taxation Div. Dir.*, N.J. Tax Rptr. (CCH) 201-011 (April 29, 1982), 10411.

This court does not here attempt to say that the Commission would or should have reached the opposite conclusion of law on the "nexus" question in the absence of the finding concerning the involvement in credit transactions. Instead, all that is being said is that this factor is one that formed some part of the basis for the Commission's conclusion and that its absence may have permissibly led the Commission to decide the question otherwise. This is further supported by the fact that this factor was the only one specifically discussed in the

Opinion, with all others merely listed. As such, the factor is material.

The only evidence in the record to support the Commission's finding on credit transaction involvement is the testimony of the two regional managers employed by Wrigley during the period in question and the company's formal position description for the regional manager. John Kroyer, regional manager from 1973 to 1975, testified that he had two or three times per year voluntarily gotten involved in mediating a credit dispute to protect future sales to a good customer. Gary Hecht, regional manager from 1976 to 1978, testified that he had no involvement of any kind in credit transactions with Wrigley customers while he was regional manager. The company's position description recites among the "Principal Activities" of the regional manager that he "Represents the company on credit problems as necessary." The Commission's finding cited above is not qualified as to the time this activity occurred. In its Opinion, the Commission restates the essence of the finding but explicitly recites that this

activity was "carried on by it (Wrigley) during the years 1973-1978." There is nothing in the record by which the Commission could find that in 1976 to 1978 the regional manager "carried on" this activity other than to have concluded that Gary Hecht was lying. His testimony was not patently absurd nor contrary to the laws of nature so as to permit ignoring it or finding its opposite. Rather, the finding could only have made through an assessment of Hecht's credibility. To have done so without the benefit of Commissioner Smith's impressions of Mr. Hecht violates Wrigley's rights to due process.

DOR points to the position description for Hecht and seems to suggest not only that this constitutes substantial evidence to support the Commission's finding but also that this removes the issue from the realm of credibility evaluation. To the extent this argument is being made, it misses the Point. Nexus with a state is established by reference to what a company's representatives did in that state, not what they were authorized to do. It is "local activities" which support a state's taxing authority on the

interstate operations of a foreign corporation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959). It is also important to note that the franchise tax at issue here is imposed on an annual basis. The analysis of Wrigley's activities for qualification for the immunity of 15 U.S.C. Sec. 381 must also be done on an annual basis. *Ringgold, supra*, at 10, 412. Even if Wrigley's activities in 1973 to 1975 remove its federal immunity to state taxation, this is not a permanent removal whereby Wrigley has no opportunity to regain it by altering its practices.

Wrigley also argues that the failure of the Commission to involve Commissioner Smith violates its statutory rights. It relies principally on the requirements of Wis. Stat. 227.46(2). DOR points to the language in Wis. Stat. 73.01(4)(3), "irrespective of ch. 227", to argue that the Sec. 227.46(2) procedure is inapplicable to the Commission's decision. This court need not address the application of this Chapter 227 procedure to the Commission, for the same result urged by Wrigley is

mandated by the specific statute defining the Commission's powers and duties. Sec. 73.01(4)(b) provides,

> "Any matter required to be heard by the commission may be heard by any member of the commission or its hearing examiner and *reported* to the commission . . . (emphasis added)

There can be no serious dispute that the assessment made by DOR against Wrigley is a "matter required to be heard by the commission". In making a decision in a case before it, the Commission may act only with the concurrence of at least three of its members. The legislature has authorized the Commission to make decisions after evidentiary hearings without all members sitting through each such hearing, but has expressly conditioned this exercise of authority with the requirement that the matter be "reported" to the full commission. The meaning of this requirement can only be gleaned by looking to its purpose.

Administrative agencies are granted substantial authority to adjudge the rights of persons coming before them. In cases where factual issues are present, such as

is true here, they act as both jury and judge. As finders of fact, they are given the broad province to assess the credibility of witnesses and to determine the weight to be assigned the evidence presented. In this latter regard, the agency, as finder of fact and subject only to the standard of substantial evidence on review of its determination, is permitted to decide which of two competing inferences to draw from undisputed evidence. The importance of the fact-finder in having the benefit of viewing the demeanor of a witness in gauging credibility is reflected in the due process requirements noted in *Shawley, supra* and a line of other cases of similar vein. While this benefit in the area of assessing the weight of the evidence and in drawing inferences from it may not be of constitutional proportion, it is nonetheless still present. The demeanor of a witness taken together with the actual words used in his or her testimony may justifiably lead the finder of fact to accord greater or lesser weight to the content of what is said or to draw one inference as opposed to another. This combination of demeanor and word choice will not always

be of significance, but the point is that in some instances it may be critical.

This feature of live witness testimony is clearly unavailable to the fact-finder who does not see the witness testify. In order to offset this loss, the legislature required the next best alternative, i.e. that the testimony be reported to the non-present agency members who were to participate in the fact-finding function. At least in cases where an issue concerning the weight of the evidence and/or a question of what factual inference to draw is present, I read the statutory language to require that the presiding commission member be personally involved in reporting to the non-present members. In such cases the use of the bare transcript is not sufficient.

Reading this statutory language in this way does no violence to the efficiency of agency operations. In most instances this has been the actual practice, for the presiding commissioner will be one of those who forms the minimum of three members who make the decision and his or her reporting function will be served through that

participation. In the limited number of cases where that is not true for some reason, the personal reporting mandate is already imposed by due process concerns in instances where credibility is at issue. Where credibility is not in issue, this mandate will only apply where weight of evidence or choice of inference considerations are material. Thus the added step imposed on the Commission's proceedings by this court's reading of Sec. 73.01(4)(b) will seldom in fact be an added step at all but will be simply accomplished through the present practice. Moreover, this interpretation is consistent with the obvious purpose sought to be accomplished by the legislature through the general requirements on agency decision-making found in Sec. 227.46(2), and it is less onerous in the extent of the procedures required.

Looking to the Decision of the Commission in this case in the context of the record presented by the transcript and exhibits, there are several material findings made where the Commission was clearly called upon to assign weight or to draw inferences from the testimony. This is apparent

in the findings that Wrigley's representatives in Wisconsin for the entire period in question were "maintaining offices in (their) home" and "conducting regular and periodic training seminars in Wisconsin", amongst others. As a result the Commission, in failing to consult with Commissioner Smith, has violated Sec. 73.01(4)(b).

Having found that the Commission has violated Wrigley's due process and statutory rights, the appropriate remedy is to remand this case to the Commission. Wis. Stat. 227.57(8). Since on remand and after following the procedure outlined below, the Commission may reach a different result on the threshold question of Wrigley's immunity under 15 U.S.C. 381, no useful purpose is served by addressing whether the assessed interest is to be simple or delinquent.

For all of the foregoing reasons IT IS ORDERED:

1. That Case No. 86CV6679 is dismissed without prejudice.

2. That the Decision and Order of the Commission dated November 18, 1986 is hereby remanded to the

Commission for further proceedings not inconsistent with this decision. At the least, the Commission shall consult personally with Mr. Smith concerning his impressions of the credibility of the witnesses and the weight to be accorded their testimony. The decision issued by the Commission after such consultation shall affirmatively describe the procedures used to meet these directions.

Dated this 20th day of August, 1987.

BY THE COURT:

Michael Nowakowski
Michael Nowakowski,
Circuit Court Judge

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611 Petitioner, vs. **WISCONSIN DEPARTMENT REVENUE OF** P.O. Box 8933 Madison, WI 53708 Respondent.	DOCKET NO. I-8591 **DECISION AND ORDER** (Drafted by Commissioner Timken)

The above-entitled matter came on to be heard by this Commission; the petitioner, William Wrigley Jr. Company, appeared by its counsel, Barbara J. Janaszek and Paul Pakalski, of the law firm of Whyte & Hirschboeck, S.C.; the respondent, Wisconsin Department of Revenue, appeared by its counsel, James L. Greenwald.

After considering the testimony, evidence and briefs of counsel, this Commission hereby finds and decides as follows:

-FACTS-

The William Wrigley Jr. Company (Wrigley) is an Illinois corporation, headquartered in Illinois, which manufactures and sells various chewing gum products throughout the United States.

The dollar volume of Wrigley's sales in Wisconsin during the years involved was as follows:

1973	-	$2,797,055
1974	-	$3,184,703
1975	-	$3,898,041
1976	-	$4,025,372
1977	-	$4,091,568
1978	-	$4,392,202

In the assessment hereunder review the respondent, Wisconsin Department of Revenue (DOR), apportioned the

following income to Wisconsin for franchise/income tax purposes:

1973	-	$ 86,663
1974	-	$ 90,185
1975	-	$316,069
1976	-	$379,475
1977	-	$342,429
1978	-	$443,374

Wrigley did not file Wisconsin corporate franchise/income tax returns or pay any taxes to Wisconsin for the years 1973-1978. It did file in its home state of Illinois and in those states where it had offices and/or manufacturing facilities.

Because Wrigley had not filed or paid taxes in Wisconsin the DOR, on October 6, 1980, issued a franchise tax assessment against it in the total amount of $246,641.04 covering the years 1973-1978. Said assessment included a late filing penalty, a negligence penalty and delinquent interest.

Wrigley petitioned the DOR for redetermination on the grounds that (a) Wrigley did not engage in business within the State of Wisconsin in a manner sufficient to subject it to the taxing jurisdiction of the State of Wisconsin under Wis. Adm. Code Sec. Tax 2.82, and that Wrigley was protected from Wisconsin income tax liability by federal law, P.L. 86-272, 15 U.S.C. Sec. 381 ("P.L. 86-272") and the United States Constitution; and (b) the assessment of delinquent interest and negligence penalties violated both Wisconsin's tax code and the DOR's regulations. On September 3, 1981, the respondent denied the petition for redetermination.

On October 21, 1981, the petitioner filed a timely appeal of the respondent's action with this Commission, objecting to the assessment of franchise taxes, interest and penalties again on the grounds that its activities within the State of Wisconsin constitute the mere solicitation of business and hence are protected from Wisconsin's franchise tax jurisdiction by federal law, to wit, P.L. 86-272, (15 U.S.C. Sec. 381) and that the petitioner

lacks sufficient "nexus" with the State of Wisconsin to subject it to Wisconsin's franchise tax.

The respondent DOR, in its brief filed with this Commission on April 9, 1986, at pages 7 & 8 "concedes that Wrigley's non-filing of returns and declarations of estimated tax was due to reasonable cause and not due to willful neglect, since it did not file upon the advice of counsel that Wrigley was exempt from taxation by Wisconsin under federal law . . . and that the evidence shows that the figures used by the respondent in the computation of the property factor in the apportionment formula should be modified in the assessment notice . . . to show that each employe maintained on average a supply of chewing gum valued at $1,000 and promotional literature valued at $200".

Wrigley sells its gum products nationwide through a sales staff comprised of field representatives, key account managers, regional sales managers and district managers. During the 1973 to 1978 period Wrigley had 7 or 8 geographical sales districts in the United States. At that

time its Chicago based Midwestern District was comprised of Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, and parts of Iowa, and the Upper peninsula of Michigan. The Wisconsin sales region of the Midwestern District was managed by a regional manager who lived in Wisconsin along with 4-5 sales representatives who lived in Wisconsin and were each responsible for a geographic territory within the State.

During 1973-1976, two of these sales representatives worked exclusively in territories within the boundaries of Wisconsin, one spent a portion of his working time in various Upper Michigan counties, and another spent approximately one-third of his working time in the State of Iowa. In addition one representative, who resided in Minnesota, worked in some of the western counties of Wisconsin which were included in Wrigley's Minnesota region. In 1977 the boundaries of the Wisconsin region were redrawn. Certain southern Wisconsin counties became part of the Peoria, Illinois region and were handled by a sales representative who lived in Illinois, and certain

western Wisconsin counties became part of the Iowa region and were handled by a sales representative living in Iowa.

The entire Midwestern District was the responsibility of a district manager who lived in the Chicago area. During the period involved Wrigley did not utilize key account managers in Wisconsin, that function being performed by the regional sales manager. Because the purchase of chewing gum by the consumer is usually based on impulse rather than a pre-planned shopping list, the display, location and maintenance of the product is primary and those functions are performed by Wrigley's sales representatives. Each of the representatives who solicited sales in Wisconsin was responsible for approximately 700 indirect and 30-50 direct accounts. A direct account was typically a wholesaler or large chain, an indirect account a grocery store.

During the period in dispute, each sales representative received from Wrigley a leased vehicle, usually a station wagon, and a supply of gum, display racks and promotional literature. The gum was carried on Wrigley's books as

inventory, the display racks were not, as they were given away to the accounts served. The gum, display racks and promotional literature were kept in the representative's home except for one representative who received special permission to rent storage space at Reynolds Transfer and Storage, in Madison. Each sales representative was reimbursed by his employer for business expenses connected with the automobile and for overnight lodging, meals and long distance telephone calls.

Each sales representative spent the large majority of his time calling on customers or potential customers in an effort to sell Wrigley's products. During a typical call to an indirect retail account, the sales representative would survey the display of Wrigley gum products and its package and flavor distribution, check the products for freshness, replacing stale gum if necessary, and make a sales presentation regarding a particular Wrigley promotion or the need to modify distribution or display of Wrigley products.

The formal position description of the sales representative is as follows:

WM. WRIGLEY JR. COMPANY

Position Description

INCUMBENT:		POSITION:	Field Representative
REPORTS TO:	Regional Manager	UNIT:	Field
DATE:	July, 1978	DEPARTMENT:	Sales

FUNCTION

This position is responsible for the implementation and maintenance of sales levels for an established sales territory based on the merchandising plan of the Wm. Wrigley Jr. Company. Develops and keeps current relations with assigned headquarters and wholesale accounts to provide service and discuss methods for improving distribution.

NATURE AND SCOPE OF PRINCIPAL ACTIVITIES

Wrigley brands of chewing gum have a wide appeal throughout the United States and enjoy general acceptance by retailers as profitable, high turnover merchandise which their customers expect to find and purchase in supermarkets, variety stores, mass merchandise stores, convenience stores, drug stores, restaurants, theaters, concession stands, news stands, vending machines, and other types of outlets. The demand for Wrigley's gum by consumers is based on a quality product which is pre-sold

by a continuing advertising program in the most effective media.

Although Wrigley products provide a generous mark-up for retailers, the modest unit selling price makes volume the key to real profits. Chewing gum is usually purchased on impulse. In order to merchandise the advertising and achieve desired volume, retailers require guidance to attractively display and promote Wrigley brands. In addition, adequate inventories of fresh chewing gum and supporting point-of-purchase materials are required at certain in-store locations where consumers will most likely respond to impulse. The number and type of displays used will vary according to the specific merchandising needs of each outlet.

The Field Representative is expected to be completely familiar with the territory assigned and the retail outlets located within that area. Good communication lines must be established with all key store personnel, e.g., store managers, buyers and department managers, in order to provide assistance with ordering and keeping accounts up-to-date. All stock must be checked for freshness and appearance to ensure superior image of the Wrigley product line. Point-of-purchase materials and brand-identification-plates must be kept in good condition, as well. The incumbent should strive toward permanent placement of new packaging and supplemental displays, as well as presentations of new products and should constantly be on the lookout for new outlets, or additional distribution avenues. Since this representative also calls on assigned headquarters and direct accounts, contact with retail stores is essential to enable retailer's problems to be discussed with those who distribute the products.

Wrigley brands are usually distributed to retailers through organizations known as direct accounts. These include chain stores, mass merchandisers, cooperatives and voluntary buying groups, wholesalers, vendors, franchise

operators, restaurant suppliers, cash and carry operators, and others. A thorough understanding of Wrigley marketing and merchandising policies is necessary as this position makes headquarters and wholesale calls to assigned direct accounts from the above categories. Through carefully prepared and well understood presentations, the incumbent is expected to influence the merchandising and buying decisions relating to Wrigley products, promotions, and market impact. Decisions made at this level can affect turnover in stores beyond the incumbent's territory and can significantly affect the distribution of Wrigley brands. Besides remaining current with Wrigley marketing data, the incumbent should know competitive products, policies, current strategies, prices, and influence on the chewing gum market. Field representatives must be in a position at all times to know exactly where the Wrigley products stand in relation to competition.

This position serves as the watchdog of the Company in the market place, observing, listening, and being sensitive to any changes or developments affecting the Wrigley Company, its products, or marketing program. Additionally, all daily reports should be completed on a timely basis and channeled to the Regional Manager as required. Properly maintained retail store and account books are a necessity as well as keeping current all accounts in payment of invoices. Due to the fact that field representatives are, for the most part, the sole direct contact that individual customer accounts have with the Wrigley Company, it is essential that the individual field representatives present themselves in a neat, polite, and professional manner to ensure that the Company image and reputation are maintained at the highest level. Field Representatives attend periodic training classes and refresher sessions at the sales training center in Schaumburg, Illinois, as well as in-field training programs.

ACCOUNTABILITY

This position is accountable for the development, implementation and maintenance of sales levels for the assigned sales territory. Approximate sales volume per territory totals $250,000 to $500,000 per year.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Call on retail outlets in an assigned territory according to a pre-determined schedule.

2. Make assigned calls on headquarters and direct accounts on a timely basis and develop effective rapport with all members of the respective management groups.

3. Establish and maintain effective relations with district managers of all multiple store operations in assigned territory.

4. Ensure that retailers have adequate inventories of all brands and pack sizes permitting them to effectively display and promote Wrigley brands of chewing gum.

5. Set up displays and promote merchandise with point-of-purchase materials in stores as necessary.

6. Carry out all activities in a neat, polite, and highly professional manner.

7. Keep current all reports, correspondence, and accounts receivable and exercise reasonable care with all property assigned and responsible for.

BWLeonard:dk
July, 1978

The majority of sales were made in the following manner: Direct accounts would submit their orders to Wrigley's office in Illinois for approval or rejection and then Wrigley would ship the gum to the direct account by common carrier. Occasionally, on the average of once a month, sales representatives would erect a display stand in an indirect account's (retailer's) store and stock it from his supply of sample gum. He would then report the transaction to Wrigley's Chicago office by "agency stock check" who would then bill the retailer's wholesaler, who would in turn bill the retailer. The average retail value of the gum transferred in such a transaction ranged from between $8 to $16.

Although the sales representative played no direct role in the credit worthiness of his customers, he did routinely receive copies of any credit type letters sent by his employer.

The first regional manager employed by Wrigley during the years 1973-1978 resided in Wisconsin, maintained a business office in the basement of his home

and held yearly training sessions there. He kept his files in a company issued file cabinet as well as a supply of gum, display racks and promotional literature. He did not receive reimbursement from Wrigley for the use of a portion of his home for an office but did claim income tax deduction for it. He also held a training session at a local hotel.

A primary function of the regional manager was to measure sales within his region. To this end, he expended over 80% of his time in the field, often with the sales representatives who he supervised. Since Wrigley had no key account managers assigned to Wisconsin the regional manager handled these accounts, which included the Kohl's and Sentry food stores and the vending machine trade. In addition to his direct sales work the regional manager also screened and recommended the hiring and firing of sales representatives, reviewed sales reports, conducted sales meetings, evaluated the performance of his sales representatives, and recommended the amount of their periodic raises, supervised the on-the-job training of

newly hired sales representatives, reapportioned sales districts, when necessary, and substituted for sick sales representatives.

On occasion, several times per year, the regional sales manager interceded in credit matters when a good account was involved.

The regional manager was also reimbursed for business expenses including overnight lodging, meals and long distance telephone calls.

The formal position description of the regional sales manager is as follows:

WM. WRIGLEY JR. COMPANY

POSITION DESCRIPTION

INCUMBENT:		POSITION:	Regional Sales Manager
REPORTS TO:	Area Sales Manager	GROUP:	Domestic
DATE:	September, 1979	UNIT:	Marketing
		DEPARTMENT:	Sales

FUNCTION

Manages the sales activities and supervises the assigned regional field representatives in carrying out the company's merchandising effort to increase sales in the region. Develops and maintains effective communications with headquarters offices located in the region.

NATURE AND SCOPE OF ACTIVITY

The Sales Department field force merchandises Wrigley's chewing gum throughout the 50 states of the United States. The country is divided into 10 areas and further divided into 56 regions. Each area is headed by an area sales manager who directs the activities of four to eight regional managers within his district. A Regional Sales Manager supervises five to ten field representatives who call on retail, wholesale, and chain accounts for the company.

The incumbent is primarily concerned with the management of the regional field force to increase sales in the region. The objective is to achieve increased distribution, display, and promotion of Wrigley brands of chewing gum in order to gain total effectiveness from the company's advertising effort.

The management of the region's field force by the incumbent includes recruiting of representatives, and actively participating with the district manager in the selection, orientation, field training, evaluation, promotion, compensation, and reassignment of the region's field representatives. Due to the high level of competition in the chewing gum market, it is especially important that the field representatives be highly skilled in up-to-date and effective sales techniques. Each field representative attends special training classes on a scheduled basis at the Wrigley Sales Training Center for field personnel, located in Schaumburg, Illinois. These training classes are

designed to acquaint the field personnel with all aspects of the company's operations and more specifically to instruct, train, and sharpen individual sales skills. The regional manager is responsible for continually evaluating the work of each field representative in the region and further developing their skills in dealing with the individual accounts.

In addition to the large number of retail accounts and chain outlets, which are primarily serviced by the field representatives, the incumbent maintains and develops sound business communications with the headquarters of one or more major drug, variety, grocery, and other chains located in the region leading to increased sales. He also maintains communications with vendors, wholesalers, and distributors operating in the region. These communications help him to assure that the Wrigley Company is in a position to take advantage of all opportunities in the retail outlets concerned. The Regional Sales Manager may present and secure the account approval for special promotions by a major direct account with stores located in other regions.

In addition to these management and merchandising responsibilities, the Regional Sales Manager prepares periodic reports analyzing the sales of the various Wrigley products in the region, and makes follow-up recommendations to the district sales manager concerning possible merchandising programs which could be implemented in the region to increase sales.

ACCOUNTABILITY

This position is accountable for the effective management of all sales activity and the attainment of established sales goals in a region with annual sales ranging between $2 million and $10 million with a field budget of $200,000 per year.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Devises and implements regional business-building efforts, solutions to current sales issues or new methods for developing the Wrigley franchise in his region.

2. Regularly calls on direct accounts to develop plans and strategies for increasing sales of Wrigley brands.

3. Accompanies field representatives on sales calls to further train and to improve individual sales skills and motivation.

4. Evaluates competitive sales-related activities in the region and reports developments to the area manager.

5. Manages five to ten field representatives. Trains new field representatives and improves skills and motivations of established representatives.

6. Calls on retail outlets to appraise the performance of the field representatives.

7. Represents the company on credit problems as necessary.

8. Assures that all company cars and property in the region are maintained in proper condition.

9. Screens prospective direct accounts and recommends action to be taken.

WORK RELATIONSHIPS

1. Works with the Assistant Vice President - Sales Services to provide statistical support regarding field data and receive advice on personnel matters.

2. Works with the Sales Training Manager to assure the timely and effective communication of proper sales and merchandising techniques to assigned managers and representatives.

3. Works with the Merchandising Manager to assure the effective use of display materials and to recommend and provide merchandising applications based on input from the field.

JLMarnul:Analyst
January, 1980

The district manager for Wrigley's Midwestern District during the period under review was officed in a suburb of Chicago. He bore the ultimate decision making responsibility for all sales and personnel matters arising in the Midwestern District.

The formal position description of the district manager is as follows:

WM. WRIGLEY JR. COMPANY

POSITION DESCRIPTION

INCUMBENT:		POSITION:	Area Sales Manager
REPORTS TO:	General Sales Manager	GROUP:	Domestic
DATE:	June, 1979	UNIT:	Marketing
		DEPARTMENT:	Sales

DEPARTMENT: Sales

FUNCTION

Directs the activities of the field sales staff in an assigned area in the attainment of established sales goals through the use of effective marketing, merchandising, and promotional programs.

NATURE AND SCOPE OF ACTIVITIES

The Sales Department field force merchandises Wrigley products throughout the 50 United States. The country is divided into 10 areas and further divided into a total of 56 regions. A typical area consists of an area manager, and four to nine regional managers who each supervise from four to ten field representatives. The incumbent maintains an office staffed with clerical personnel. The area field organization cultivates and services from 1,000 to 2,000 direct accounts, and 15,000 to 30,000 Class "A" retail outlets. Accounts are assigned to field representatives for

reviewing with each representative regularly calling on 600-800 of these outlets under the supervision of a regional manager.

The Area Manager personally, and through key account managers, establishes and maintains effective relations with key offices of major chains and wholesalers in the district because of their importance to our business. Incumbent may also supply additional coverage to regional manager or representative assigned accounts.

In all account relations, particular emphasis is placed on the maintenance of adequate and balanced stocks, and the effective use of company developed sales aids and promotions for stimulating impulse buying at point of purchase.

Display units and related merchandising materials are prepared, developed and procured at the general sales level. However, the Area Manager and field staff, because of experience and knowledge of market needs, contribute significantly to this development.

Actual selling is accomplished through a continuing advertising campaign aimed directly at the ultimate consumer. The field sales organization ensures the products are readily available at the various distribution outlets to meet the demands of the premotivated consumer. Continuous feedback is provided to the general sales offices and other Area Managers on all trends and developments that can affect the sale of products. This feedback may involve specific departments such as:

Sales - in regard to competitive practices and market position

Advertising - in regard to consumer reaction and effectiveness of promotions

Traffic - in regard to shipping delays

Credit - in regard to an account's financial status

The Area Manager, through the regional managers, builds a competent and enthusiastic field-sales force. Field representatives are generally hired by the regional manager in the local territory within salary and staffing levels established by the general sales office. They receive a salary, and are provided with a company car and are reimbursed for business and travel expenses. Some newly hired representatives may be mature with extensive experience, but usually they are younger people with limited merchandising experience. This requires an intensive training program in Wrigley merchandising methods, which is carried out at the Wrigley Sales Training Center after an orientation and training program in the field.

ACCOUNTABILITY

In broadest terms, this position is responsible for increasing the turnover rate and sales. Also, this position is accountable for recommending sales goals consistent with Wrigley marketing policy and the attainment of approved sales goals in the area through the effective implementation of marketing and merchandising programs. Average annual sales for an area total $16 million. Average annual field force budget for an area totals $1.1 million.

PRINCIPAL ACTIVITIES PERFORMED BY THE INCUMBENT

1. Devises and implements district business-building efforts, solutions to current sales issues or new methods for developing the Wrigley franchise in his region.

2. Personally maintains contact with key or problem accounts to monitor the market or to assist in account relations which require attention at the area manager level.

3. Analyzes monthly basic and major trade area tabulation to evaluate sales trends to determine the effectiveness of the personnel in the area.

4. Maintains and develops a competent field sales force through proper selection, orientation and field training, and deployment of personnel.

5. Travels throughout the area in order to work with and evaluate the effectiveness and progress of regional managers and field representatives.

6. Maintains effective communication between the general sales office and the field on all operational matters and product promotions.

7. Plans and directs promotional activity for the area.

8. Manages controllable expenses within approved budget.

9. Assures the conduct of business is within Wrigley policy and procedures.

10. Reviews expense accounts to assure that field staff are following reasonable and proper standards within company policy.

WORK RELATIONSHIPS

1. Works with the Assistant Vice President - Sales Services to provide statistical support regarding field data and receive advice on personnel matters.

2. Works with the Sales Training Manager to assure the timely and effective communication of proper sales and merchandising techniques to assigned managers and representatives.

3. Works with the Merchandising Manager to assure that effective use of display materials and to recommend improved merchandising applications based on input from the field.

JLMarnul:Analyst
January, 1980

Wrigley is not and never has been licensed to do business in Wisconsin. It has never had a bank account in the State and has not invoked the jurisdiction of a Wisconsin court. At no time has Wrigley owned or leased real estate or operated a manufacturing or warehouse facility here.

Wrigley's credit department in Chicago possessed the sole discretion as to whether credit was to be granted to a customer and virtually all credit transactions were handled

there. All payments for Wrigley products were mailed directly to Chicago and it was Wrigley's credit department which followed up on delinquent accounts.

During the years 1973-1978, Wrigley purchased extensive advertising on television and radio programs in Wisconsin and in newspapers printed and sold in Wisconsin. Newspaper advertising included the printing of a coupon, which the reader could clip out to receive a special premium or to purchase gum from a retailer at a reduced price. In 1973, 1974 and 1975, Wrigley purchased spot television and radio advertising in Green Bay, La Crosse, Madison and Milwaukee. In 1976, it purchased spot television advertising in the same cities and also in Wausau. In 1977 and 1978, it purchased spot television advertising only in Milwaukee.

The issues left for this Commission to determine in the order of their relative importance are:

Whether the business activities of Wrigley in the State of Wisconsin during the years 1973 through 1978 constituted doing business in Wisconsin

within the intent and meaning of Sec. 71.01(2), Wisconsin Statutes, in excess of the "solicitation of orders" protected by P.L. 86-272; and

Whether the tax assessed, if found to be due, is subject to delinquent or simple interest, and whether the $10 late filing penalty was properly imposed.

-CONCLUSIONS OF LAW-

The ongoing business activities of the William Wrigley Jr. Company in the State of Wisconsin during the years 1973 through 1978 exceeded the "solicitation of orders" protected by 15 U.S.C. 381 (P.L. 86-272).

The petitioner had "nexus" with the State of Wisconsin and its income for the years 1973 through 1978 was subject to apportionment and taxation by the State of Wisconsin, within the intent and meaning of Sec. 71.01(2) of the Wisconsin Statutes.

The $10 late filing penalty contained in Sec. 71.11(40) of the Wisconsin Statutes is mandatory and not subject to review by this Commission.

Due to the provisions of Sec. 71.13(2) of the Wisconsin Statutes, the taxes due hereunder are subject to the interest rates contained in Sec. 71.09(5)(a) of the Wisconsin Statutes, not the delinquent interest rates imposed by Sec. 71.13(1) of the Wisconsin Statutes.

Therefore,

IT IS HEREBY ORDERED

That the respondent's action on petitioner's petition for redetermination be and the same is hereby modified to reflect the above Findings and Conclusions.

Dated at Madison, Wisconsin, this 18th day of November, 1986.

WISCONSIN TAX APPEALS COMMISSION

/s/ John P. Morris
John P. Morris, Chairperson

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

/s/ Catherine M. Doyle
Catherine M. Doyle, Commissioner

/s/ Mary Wagner-Malloy
Mary Wagner Malloy, Commissioner

(Concurs in part, Dissents in part)
Robert C. Junceau, Commissioner

pc: Petitioner
Representative
Respondent

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

STATE OF WISCONSIN

TAX APPEALS COMMISSION

****

WILLIAM WRIGLEY JR. COMPANY

Petitioner,

vs.

WISCONSIN DEPARTMENT REVENUE OF

Respondent.

DOCKET NO. I-8591

OPINION

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The question of nexus and the protection afforded under Public Law 81-272 (15 U.S.C. 381) is of growing concern to Wisconsin and the companies who sell their products here. Public Law 82-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection and, if accepted, are filled by shipment or

delivery from outside the state. This provision of our federal law provides as follows:

15 United States Code §381

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) The solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The provision of the Wisconsin Statutes which imposes a franchise tax on corporations doing business in Wisconsin is Sec. 71.01(2), which states:

Section 71.01(2), Wisconsin Statutes

(2) For the privilege of exercising its franchise or doing business in this state in a corporate capacity . . . , every domestic or foreign corporation . . . shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year . . . .

The provisions of the Wisconsin Administrative Code which are relevant to this proceeding are as follows:

Tax 2.82(1)(b), Wisconsin Administrative Code

(b) A residence of an employe or representative is not ordinarily considered a business location of the employer unless the facts indicate otherwise. It could be considered a business location under one or more of the following conditions: . . . the employe uses supplies, equipment or samples furnished by the employer; or the space is used by the employe to . . . hold sales meetings . . . .

Tax 2.82(4), Wisconsin Administrative Code

(4) WHAT CONSTITUTES "NEXUS."

(a) Factors. If a foreign corporation has one or more of the following activities in Wisconsin, it is considered to have "nexus" and shall be subject to Wisconsin franchise/income taxes:

1. Maintenance of any business location in Wisconsin, including any kind of office.

* * *

5. Usual or frequent activity in Wisconsin by employes or representatives soliciting orders with authority to accept them.

6. Usual or frequent activity in Wisconsin by employes or representatives engaged in a purchasing activity . . . .

* * *

8. Miscellaneous other activities by employes or representatives in Wisconsin . . . .

9. Leasing of tangible property . . . for use in Wisconsin.

NEXUS VS. P.L. 86-272

The question of when a business has stepped across the line and lost the protection afforded by P.L. 86-272 is factual and must be determined on a case by case basis.

In response to the growing state and national concern and confusion in this area, the Multistate Tax Commission (MTC) on June 21, 1985 passed Resolution 1985-4 which established the following guidelines which this Commission finds helpful and hereby adopts:

-SOLICITATION OF ORDERS-

For the in-state activity to be immune, it must be limited solely to solicitation. If there is any other activity unrelated to solicitation the immunity is lost. Examples of

activities which are immune or non-immune are as follows:

A. Immune Activities.

1. Advertising campaigns incidental to missionary activities.

2. Carrying samples only for display or for distribution without charge or other consideration.

3. Owning or furnishing autos to salesmen.

4. Passing inquiries and complaints on to home office.

5. Incidental and minor advertising, i.e., notice in newspapers that a salesman will be in town at a certain time.

6. Missionary sales activities.

7. Checking of customer's inventories (for re-order, but not for other purposes).

8. Maintaining sample or display room for two weeks (14 days) or less during the tax year.

9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in home or otherwise).

B. Non-Immune Activities.

The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.

2. Collecting delinquent accounts.

3. Investigating credit worthiness.

4. Installation or supervision of installation.

5. Conducting training courses, seminars or lectures.

6. Providing engineering functions.

7. Handling customer complaints.

8. Approving or accepting orders.

9. Repossessing property.

10. Securing deposits on sales.

11. Picking up or replacing damaged or returned property.

12. Hiring, training or supervising personnel.

13. Providing shipping information and coordinating deliveries.

14. Maintaining samples or display room in excess of two weeks (14 days) during the tax year.

15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.

16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:

a. Repair shop
b. Parts department
c. Purchasing office
d. Employment office
e. Warehouse
f. Meeting place for directors, officers or employees
g. Stock of goods
h. Telephone answering service
i. Mobile stores, i.e., trucks with driver salesmen
j. Real property or fixtures of any kind

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in home or otherwise).

19. Conducting any activity which is not an integral part of the solicitation of orders.

When applying these guidelines to the matter before us, we are compelled to conclude that Wrigley did indeed cross the line and lost the protection afforded in 15 U.S.C. 381 or P.L. 86-272 due to the following non-immune

activities carried on by it during the years 1973-1978 in the State of Wisconsin:

- replacement of stale gum
- maintaining product displays both as to location design and content
- direct sales of gum by use of "agency stock checks"
- maintaining offices in home
- conducting regular and periodic training seminars in Wisconsin
- recommending hiring, firing and raises of sales representatives in Wisconsin by regional manager
- involvement in credit transactions by regional manager
- training and supervising sales representatives by regional sales manager
- rental of storage space in Madison, Wisconsin
- the purchase of non-incidental advertising in Wisconsin

A perusal of the position description of the Regional Manager is helpful. Although increasing sales volume was obviously the primary goal of all of Wrigley's employees in Wisconsin, the regional manager also performed other important managerial and supervisory functions, all within the confines of the State. One of his listed principal activities was to "represent the company on credit problems as necessary". Although petitioner attempted to minimize this responsibility at the hearing before this Commission, its regional manager testified that "a couple, three times a year" he mediated credit problems between a very good account and his credit department in Chicago. This alone clearly exceeds the "solicitation of orders".

On balance, the considerable activities of Wrigley in the State of Wisconsin during the years 1973 through 1978 transcended the solicitation of orders protected by P.L. 86-272 irregardless of whether the DOR or Wrigley had the burden of proof to show it.

SUPPORTING CASE AUTHORITY

Miles Laboratories v. Department of Revenue, 546 P 2d 1081 (1976)

The Drackett Products Co. v. Conrad, N.D. Sup.Ct., N.D. Tax Rptrs. ¶200-316 (1985)

Milwaukee Seasoning Laboratories, Inc. v. Wisconsin Department of Revenue, WTAC, Wis. Tax Rptr. ¶202-652 (1986)

Grande Cheese Company v. Wisconsin Department of Revenue, WTAC, Wis. Tax Rptr. ¶202-259 (1985)

Avon Products, Inc. v. Wisconsin Department of Revenue, WTAC, Docket No. I-8494 (March 14, 1986)

Ministers Life & Casualty Union v. Haase, 30 Wis. 2d 339 (1966)

DELINQUENT VS. SIMPLE INTEREST

Section 71.09(5)(a) of the Wisconsin Statutes provides for simple interest.

Section 71.09(5)(a), Wisconsin Statutes

(5)(a) In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid. (See Footnote[1])

Section 71.13(1) of the Wisconsin Statutes provides for delinquent interest.

Section 71.13(1), Wisconsin Statutes

71.13 **Collection of delinquent taxes.**

(1)(a) Income and franchise taxes shall become delinquent if not paid when due under sec. 71.10(9), and when delinquent shall be subject to interest at the rate of 1.5% per month until paid . . . .

Section 71.13(2) of the Wisconsin Statutes provides as follows:

Section 71.13(2), Wisconsin Statutes

(2) Any additional income or franchise tax assessment contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive. Any additional income or franchise tax assessment so contested shall be subject to s. 71.11(23).

The Wisconsin Department of Revenue seeks to impose 18% delinquent interest rather than 6% or 9% simple interest despite the fact that it has canceled the negligence penalty it originally imposed and has conceded that

Wrigley's failure to file was due to good cause, and also despite the fact that the delinquent interest totaled over $75,000 while the negligence penalty it imposed and then canceled was far less.

Delinquent interest is meant to punish – simple interest to recoup. Wrigley should not be punished; it was acting in good faith and on the advice of counsel. Certainly equity is on its side, but on this issue we believe the law also supports them. That law was persuasively stated on pages -55- thru -59- of Wrigley's brief, and we hereafter adopt it as our partial opinion on the matter.

The only statutory authority for imposition of the 18% rate (1.5% per month) is found in section 71.13(1)(a), *Wis. Stat.*, which provides that "[i]ncome and franchise taxes shall become delinquent if not paid when due under s. 71.10(9), and *when delinquent* shall be subject to interest at the rate of 1.5% per month until paid. . . ." (emphasis added). As the language of the statute makes clear, this section imposes the 18% annual rate only on taxes which are delinquent. Section 71.13(2), which follows

immediately after the section quoted, provides a special rule for determining when taxes which are contested become delinquent. This section provides that "[a]ny additional income or franchise tax assessment contested before the tax appeals commission or in the courts, which is finally determined to be correct, shall become delinquent if not paid on or before the 30th day following the date on which the order or judgment representing such final determination becomes final and conclusive."

As is readily apparent from the language of section 71.13(1) and (2), contested taxes such as those here involved do not become delinquent until 30 days after administrative and judicial remedies are exhausted, and until that time, cannot be subject to interest at the delinquency rate.

Moreover, this conclusion is mandated by other provisions of the statutes, as well. Section 71.13(1)(a) establishes a general rule that taxes become "delinquent" if not paid "when due under s. 71.10(9)." Section 71.10(9)(a), in turn, provides that "[c]orporation

franchise and income taxes not paid on or before the 15th day of the 3rd month following the close of the income year, shall become delinquent." In other words, corporate taxes ordinarily become due, and if not paid become delinquent, on the 15th day of the third month after the close of the taxpayer's taxable year. However, section 71.10(9)(d) modifies this general rule by providing that "additional income taxes assessed under s. 71.11(16) and (20) shall become due and payable on entry upon the assessment roll." Sections 71.11(16) and (20) are the sections authorizing the Department of Revenue to audit returns and issue additional assessments such as the assessment at issue in this case. It follows that the taxes at issue in the instant case, which were assessed pursuant to audit will become due only when they are entered upon the assessment roll.

Under sections 71.11(22) and 71.12(1)(a), assessments may not be entered on the assessment roll until the taxpayer has been given notice thereof in writing. Section 71.12(1)(a) provides that any person who receives

such a notice of additional assessment may petition the Department of Revenue for a redetermination thereof, and thereafter may request a hearing before the Tax Appeals Commission. Section 71.12(2) further provides that if such a hearing is requested, the additional tax "shall not be placed on the assessment roll until after hearing and determination of the tax by the tax appeals commission or disposition of the appeal . . ."

Finally, section 71.09(5)(a) provides for a lower 12% rate[1] of interest to be applied to taxes "from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid." This section thus clearly contemplates a period of time during which assessed taxes, even though not paid, are not delinquent. The Department of Revenue's apparent interpretation of the statute, to the effect that taxes become delinquent on the day on which the return for the year in question should have been filed, would render this section of the statutes completely meaningless, since there

would then be no period of nondelinquency during which the lower interest rate specified by Section 71.09(5)(a) would apply. It is hornbook law that construction of statutes which render parts of the statute superfluous must be avoided. *Milwaukee Metropolitan Sewerage District v. Wisconsin Dept. of Natural Resources*, 122 Wis. 2d 330, 336, 362 N.W. 2d 158 (Ct. App. 1984).

In short, Wrigley's position that it is not subject to the delinquency penalty in this instance is supported threefold: first, section 71.13(2) specifically and unequivocally modifies the general rule provided in section 71.13(1) by providing that taxes which are contested before the Tax Appeals Commission do not become delinquent until 30 days following its decision. Second, the series of statutory rules provided in section 71.10(9), 71.11(22) and 71.12(2) clearly establishes that the taxes here at issue, which have been assessed pursuant to audit, do not become due and payable until after the taxpayer has exhausted all of his administrative and judicial remedies. Since the taxes have not yet become due, they cannot be delinquent, because

section 71.13(1)(a) makes delinquency dependent upon the taxes first becoming due. Third, section 71.09(5)(a) clearly contemplated a period of time during which subsequently assessed taxes are not delinquent, and accordingly bear a lower rate of interest. Accordingly, the DOR's attempt to impose interest at the delinquency rate is without legal basis and must be rejected as a matter of law.

Submitted by

/s/ Thomas R. Timken
Thomas R. Timken, Commissioner

FOOTNOTE

[1] Section 71.09(5)(a) was amended in 1981 to make a 12% rate applicable to all nondelinquent taxes assessed on or after August 1, 1981, regardless of the year to which the assessment applies. L. 1981, Ch. 20, § 1090n. The assessment here at issue was made prior to the date of amendment. Accordingly, pursuant to the statute in effect as of the date of assessment, the applicable nondelinquent rate is 6% for the years 1973 and 1974 and 9% for the years thereafter.

STATE OF WISCONSIN

TAX APPEALS COMMISSION

WILLIAM WRIGLEY JR. COMPANY		
Petitioner,		DOCKET NO. I-8591
vs.		DISSENTING OPINION
WISCONSIN DEPARTMENT REVENUE OF		
Respondent.		

I dissent from the majority on the issue of reversing the assessment of delinquent interest in favor of simple interest. I am also of the opinion that the issue of burden of proof raised by the petitioner is related to the delinquent interest issue and must be resolved in respondent's favor.

I join in the majority decision on the nexus and late filing issues.

A point which must be emphasized regarding the questions of delinquent interest and burden of proof is that petitioner at no time has filed franchise tax returns for any

of the years under review. Respondent's assessment was thus made under field audit and assessment powers conferred by § 71.11(20)(b) and (c) which provide as follows:

> "(b) For the purpose of ascertaining the correctness of any return *or for the purpose of making a determination of the taxable income of any person*, the department may examine or cause to be examined by any agent or representative designated by it, any books, papers, records or memoranda bearing on the income of the person, and may require the production of the books, papers, records or memoranda, and require the attendance of any person having knowledge in the premises, and may take testimony and require proof material for its information. Upon such information as it may be able to discover, the department shall determine the true amount of income received during the year or years under investigation."
>
> "(c) If it appears upon such investigation that a person has been over or under assessed, *or that no assessment has been made when one should have been made*, the department shall make a *correct assessment in the manner provided in this section*." [Emphasis added].

The underlined portions of the statute clearly authorize respondent to determine and assess taxable income or franchise tax in the absence of a return. An estimated or doomage assessment (see § 71.11(4), Stats.),

while permitted, is not required. *Baker v. Department of Taxation*, 250 Wis. 439, 440-41 (1947).

Petitioner has asserted and the majority has implicitly agreed that the assessment made here by respondent is an "additional assessment."

If petitioner is correct, I would agree that the delinquent interest does not apply under the present facts, by application of § 71.13(1)(a), incorporating § 71.10(9), Stats., and further, that the burden of proof is assigned to the state under § 71.11(21)(cm), at least as it pertains to assessment made for periods exceeding 6 years prior to the assessment. However, I disagree with the contention that an "additional assessment" was made.

Petitioner takes the position that *any* assessment made by the respondent, in contradistinction to the petitioner, is an "additional assessment." Respondent argues that respondent's assessments are not "additional" where, as here, no self-assessment by the taxpayer has ever been made, and respondent's assessment is the "initial" or "original assessment."

Neither party cites authority for its conclusion regarding the meaning of the term "additional assessment."

The term has not been defined in the statute. The term has been considered by the Wisconsin Supreme Court involving the question of when the assessment is complete for purposes of the statute of limitations. See *Weyenberg Shoe Mfg. Co. v. Kelley*, 210 Wis. 638 (1933), and *Cudahy v. Tax Comm.*, 226 Wis. 317 (1937) reflecting the statutory amendments made to legislatively overrule the *Weyenberg Shoe* holding. These opinions are not particularly helpful in defining the term.

Three decisions of the Wisconsin Board of Tax Appeals (this Commission's predecessor) discussed the term "additional assessment." In the first such case, *Superior Water, Light and Power Co. v. Department of Taxation*, 1 WBTA 274, 277 (1941) it was stated as follows:

> "The word 'assessment', as used in the statutes, together with its modifying phrase 'additional,' in our opinion was intended to identify the tax which results from a determination of the taxpayer's liability disclosed through the medium of a field or office audit and becomes existent by virtue of the taxing authority's discovery or ascertainment of

> unauthorized credits or deductions, items of the taxpayer's income not heretofore subjected to the proper tax, and a consideration of the factors essential in computing the correct assessment according to law."

In my opinion, this quote clearly contemplates a self-assessment by the taxpayer by its reference to "unauthorized credits or deductions" as well as "*items* of . . . income *not heretofore subjected* to the proper tax,".

Later Board decisions in *Amber, Inc. v. Department of Taxation*, 2 WBTA 571, 580 (1946) and *Libby, McNeill & Libby v. Department of Taxation*, 2 WBTA 604, 611 (1946) further support this conclusion. Each opinion, after citing the *Superior Water* quote above, cited Law of Federal Income Taxation, *Mertens* for definitions of "additional assessment" under earlier federal revenue acts as meaning "a further assessment for a tax of the same character *previously paid in part*." [Emphasis added] *Amber, Inc., id.*, n.l; *Libby, id.*, n.l. It is noteworthy that in all three cases returns had been filed. I conclude, therefore, that "additional assessment" as considered in these cases contemplated the situation where a return had been filed,

or a previous assessment had been made for the year(s) in question.

This Commission has more recently approved the respondent's imposition of delinquent interest under § 71.13(1)(a), Stats., where an income tax return for the period in question was not timely filed. See *Olken v. Department of Revenue*, WTAC Docket No. I-8203, CCH Wis. Tax Rep. ¶202-057 (1982), where application of the delinquent rate was sustained for 1972-1978. Returns were filed by the petitioner, but not until the prehearing conference before this Commission. See also *Gottschalk v. Department of Revenue*, WTAC Docket No. I-7642, CCH Wis. Tax Rep. ¶201-922 (1981), where no return was filed until nine days before the issuance of the appellate bureau's notice of action.

Each of these cases involved filing of returns after the income tax assessment and delinquent interest thereon were imposed. Thus, they are not materially different from the complete non-filing situation present here.

Based on my reading of the above discussed Board cases, I must conclude that the term "additional assessment" assumes the filing of a return and self-assessment or some other previous assessment.

Our two more recent decisions in *Olken* and *Gottschalk* are ample authority and precedent for the respondent's application of delinquent interest under § 71.13(1)(a) to an assessment made in the absence of a properly filed return or payment of the tax due.

Since § 71.11(20)(c) authorizes a "correct assessment" and does not use the term "additional," I must conclude that the "correct assessment" contemplated may be either an "original" assessment, as here in the case of no prior assessment, or an "additional" assessment as used in reference to the auditing of returns or additional to some other assessment of the same type of tax for the same year.

There are also, beyond the clear meaning of the word "additional," several other very important reasons why I do not consider the assessment here as an "additional" assessment. They have to do with "symmetry" in the

statutes. First, the construction proffered by petitioner would favor non-filers over *late* filers because § 71.10(9)(c) clearly provides that "Taxes due on returns filed after the date on which returns are required to be filed shall be deemed delinquent." Delinquent taxes are subject to delinquent interest under § 71.13(1)(a). I find any construction favoring non-filing as anomalous, if not totally absurd. Secondly, delinquent interest applies to *sales* tax unpaid by the due date of the return in the case of no return filed or a return filed late, by a more clearly expressed statute. See § 77.60(2)(b), Stats. There is no reason which comes to mind why the legislature would sanction delinquent interest on sales tax non-filers but not on franchise/income tax non-filers.

I further disagree with the conclusion of the majority in relation to the reference in § 71.13(1)(a) to § 71.10(9) that § 71.10(9)(a) is limited by § 71.10(9)(d). Subs. (9)(a) deals specifically with the subject matter of delinquency of corporation franchise and income taxes not paid on or before the 15th day of the 3rd month following the close of

the income year. Subs. (9)(d) refers more generally to when back assessments of *omitted* income taxes and additional income taxes assessed become "due and payable." While the cross-reference in § 71.13(1)(a) that taxes become delinquent if not paid "when due" under § 71.10(9) generally determines the date of delinquency, this cannot reasonably be read to control over the delinquency date established with respect to unpaid corporation franchise or income taxes as set forth in § 71.10(9)(a). When read together, §§ 71.10(9)(a) and (d) mean that corporation income or franchise taxes not paid when originally due whether self-assessed on the return or no return is filed where one was due become delinquent thereafter. Additional assessments made by respondent are due and payable upon entry on the assessment roll, i.e., when they have become final and conclusive. In other words, corporate franchise taxes are originally due under § 71.10(9) on or before the 15th day of the 3rd month following close of the income year. Thus, although the petitioner has the right to contest the amount of taxes

assessed by respondent absent a filed return, the taxes as finally determined are deemed delinquent as of the due date of the return. This is the equivalent of a self-assessment by a return filed without payment of the taxes due. This is the interpretation which has been followed administratively by respondent in this and other cases.

Petitioner has not shown me any sufficient reason to depart from precedent of this Commission construing § 71.13(1)(a) to require delinquent interest as of the would-be due date of the return where one is not filed, or to inject absurdity or asymmetry vis-a-vis other income/franchise and sales tax provisions.

My conclusion in this regard carries over to the issue of burden of proof. Both parties agree that under ordinary circumstances the burden of proof to show the assessment was incorrect is upon the taxpayer. However, petitioner correctly points out that under § 71.11(21)(cm), Stats., the burden shifts to the respondent to prove by a preponderance of the evidence "if additional assessments

are made for any period more than 6 years before the year in which the assessment is made." I again agree with respondent, however, that the burden of proof shifts only if "*additional* assessments" are made, which was not the case here. Subsection (c) of § 71.21 allows for assessment for any year since January 1, 1911 of income of any year if either the person has (1) made an incorrect income or franchise tax return with intent to defeat or evade the income or franchise tax law, or (2) failed to file any income tax or franchise tax return for any of such years. In only the first situation would the respondent's assessment have been "additional" under my view.

Section 71.11(20)(c) refers to a "correct assessment in the manner provided in this *section*," i.e., § 71.11, Stats., if "no assessment has been made where one has been made." The assessment time limitations under § 71.11(21) are not limited to additional assessments because subs. 71.11(20)(c) permits "correct assessment" where no assessment has been made, in the manner provided in § 71.11. However, § 71.11(21)(cm) is *limited* to additional

assessments, not to original assessments under § 71.11(20)(c).

For these reasons I believe that the burden of proof remained with petitioner.

I therefore dissent from the Commission's decision to the extent it reverses the assessment of delinquent interest.

Submitted by:

/s/ Robert C. Junceau
Robert C. Juneau, Commissioner

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.12 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.16 of the Wisconsin Statutes, a copy of which is printed on the reverse side hereto. The petition should be filed in circuit court and served upon the Wisconsin Tax Appeals Commission within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the

decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for judicial review should name the Department of Revenue as respondent and must be served upon that department within 30 days of filing the petition for judicial review in circuit court.

This notice is part of the decision and incorporated therein.

Note: Section 227.12 and 227.16 Wis. Stats. see reverse side.

The statute sections shown in this material have been generated from the original data base of the 1981-92 Wisconsin Statutes, but may not be an exact duplication. Please refer to the 1981-82 Wisconsin Statutes for the official text.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the

petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 139; 1979 c. 208.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for

rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review hoard) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice. other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of

required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

History: 1971 c. 243; 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 26 s. 75; 1977 c. 187; 1979 c. 90, 208, 355.

The circuit court has no jurisdiction of an appeal from the tax appeals commission where the petition for review was served only on the department of revenue and not on the commission within the allowed 30 days. Brachtl v. Dept. of Revenue, 48 W (2d) 184, 179 NW (2d) 921.

(2)

No. 91-119

Supreme Court, U.S.
FILED
AUG 16 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 15 U.S.C. § 381, which prohibits states from taxing foreign corporations whose only activities within the state are the solicitation of orders, bar the assessment and collection of Wisconsin franchise tax from Respondent for the years 1973-1978?

The Wisconsin Supreme Court answered this question in the affirmative.

LIST OF PARTIES

The Respondent, Wm. Wrigley Jr. Company, is a corporation. Respondent has no parent companies or subsidiaries (except wholly owned subsidiaries) to list pursuant to Rule 29.1.

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No. 91-119

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

This issue in this case is whether the Wisconsin Supreme Court properly applied a statute, 15 U.S.C. § 381, to the activities of certain employees of the Respondent, Wm. Wrigley Jr. Company ("Wrigley") in Wisconsin during the years 1973 through 1978. The outcome in this case, as it is in each case that arises under this statute, is dependent upon its unique facts and circumstances. A review of the application of that statute in this case necessarily requires a careful review of the facts.

In its Statement of the Case, the Petitioner, the Wisconsin Department of Revenue ("DOR"), gives a highly selective summary of the factual and procedural background of this case. As a result of highlighting some facts and passing over others, DOR has mischaracterized the factual background of this case and has exaggerated the significance of a few elements of this case in disregard for the totality of the circumstances out of which this case arises.

For example, as if to suggest that Wrigley maintained an inventory of goods for sale within Wisconsin (an act that would cause Wrigley to lose the protection of the statute at issue), DOR asserts that "Wrigley's sales representatives maintained substantial stocks of gum, carried on company books as inventory . . ." Petition at 6. However, the portion of the record to which DOR refers the Court does not support that statement (note the conspicuous absence of any finding that the "stocks" of gum were "substantial"). Furthermore, DOR skirts the fact that these "stocks" of gum were not sold, but merely were used for promotional purposes. Nor does DOR mention that 35-40% of this "inventory" was stale, or that the gum carried by each salesperson had a value of only about $1,000.00. *See William Wrigley, Jr. Co. v. Department of Revenue*, 160 Wis. 2d 53, 66, 465 N.W.2d 800, 804 (1991), reprinted in Petitioner's Appendix at A-1, A-16 (hereinafter, references to the decision below will be to the pages of the Petitioner's Appendix).

Other examples of DOR's partial treatment of the facts can be found by comparing DOR's Statement with the summary of the case stated by the Wisconsin Supreme Court in its decision. *See* A-11 - A-22. Accordingly, for its statement of the case, Wrigley hereby adopts the summary contained in the decision of the Wisconsin Supreme

Court, and encourages the Court to review that summary for a complete, balanced exposition of how this case arose.

A comparison between DOR's Statement and the Wisconsin Supreme Court's summary shows how fact-intensive this case is, and of what limited use further review of this case would be. The comparison demonstrates how dependent the application of Section 381 is upon the inferences to be drawn from the evidence and upon the weight assigned to certain facts.[1] Indeed, the lengths to which DOR goes in trying to skew the facts in its favor shows that this case involves much more of a clash between different views of the evidence and the facts than it does a conflict of views regarding the correct interpretation of 15 U.S.C. § 381.[2]

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[1] In this regard, it is noteworthy that, despite the conflict alleged to exist among various tribunals regarding the proper interpretation of Section 381, no court faced with the precise mix of activities in which Wrigley engaged in Wisconsin has held them to exceed the scope of Section 381. To the contrary, as the Wisconsin Supreme Court pointed out in the decision below (*see* A-38 - A-40), in the one case where precisely the same kind of activities were at issue, the outcome was the same as below. *In the Matter of the Petition of William Wrigley, Jr. Company*, a copy of which is appended to this brief at a.3.

[2] This clash is further demonstrated by an item in the record which DOR did not include in its appendix. The record in this case was made at an evidentiary hearing conducted by the Wisconsin Tax Appeals Commission ("TAC"). The TAC initially found in favor of DOR. This decision was reversed by the Circuit Court for Dane County, however, because the TAC had failed to consult with the Commissioner who actually heard the evidence and whose "factual determination was material to the Commission's Decision and Order." *See* A-8, A-207, A-215 - A-216. DOR attempts to minimize the importance of this reversal by referring to it as a "procedural remand." Petition at 2. Moreover, DOR neglects to include in the appendix to the Petition the written "Impressions" of that Commissioner, who wrote that he would have found in

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REASONS FOR DENYING THE WRIT

In essence, DOR seeks review of two points of statutory construction: (1) the validity of the Wisconsin Supreme Court's interpretation of the meaning of the statutory term "solicitation" and (2) its construction of the term "only." DOR asserts that the Wisconsin Supreme Court's interpretation of those terms is in error and that a conflict among state courts as to the meaning of those terms requires the intervention of this Court. DOR's position is without merit.

I.

THE WISCONSIN SUPREME COURT DID NOT ERR IN CONSTRUING THE STATUTORY TERM "SOLICITATION"

DOR's first reason for granting a writ in this case is that the Wisconsin Supreme Court's construction of the statute is impermissibly broad in that it "alters the pre-existing powers of the states to a degree not supported by clearly expressed textual language." Petition at 16. The pre-existing state power that DOR claims to have been altered is an alleged state power to tax the income of foreign corporations. DOR's reasoning is flawed in three ways.[3]

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[2] *continued*
favor of Wrigley based on the evidence he heard. Although the TAC later reinstated its finding in favor of DOR, it seemed to do so totally without regard to the inferences drawn by that Commissioner or the weight he assigned to the evidence he heard as trier of fact. The Impressions are appended to this Brief at a.1.

[3] DOR's argument also should be rejected because the argument was not raised for consideration by the courts and administrative bodies below. Although the brief DOR submitted to the Wisconsin Supreme Court contains citations to and quotes from some of the same authorities DOR quotes at pages 12 and 14 of its Petition, DOR did not in any way articulate or develop the theory

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1.

First, DOR's argument is premised upon a mistaken view of the constitutional framework within which Section 381 operates. DOR contends that review of this case is necessary because the interpretation given Section 381 by the Wisconsin Supreme Court is inconsistent with "traditional due process apportionment principles." Petition at 21. DOR apparently is arguing that states have a *right* to apportion the income of foreign corporations based on the Due Process clause of the Fourteenth Amendment. *See* Petition at 16. In so arguing, DOR misunderstands the constitutional role of "apportionment."

The term "apportionment" describes a right, protected by the Due Process clause of the Fourteenth Amendment, to have any tax imposed on interstate business operations to be "fairly apportioned." *Trinova Corp. v. Michigan Dept. of Treasury*, ___ U.S. ___, 111 S. Ct. 818, 828 (1991); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 165-166 (1983). However, it is the *taxpayer*, not the *state*, that is protected by this right.[4] It is simply not true that a state owns some constitutional right or power to "apportion" which it may invoke against

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[3] *continued*
of statutory construction it advances in its Petition. Despite the fact that the proper interpretation of the statute has been in issue from the outset of this case, DOR has chosen to wait until now to assert in any substance this statutory construction argument. A petitioner may not raise matters before this Court which it failed to raise before the lower courts. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

[4] DOR's invocation of the Due Process clause presumes, mistakenly, that the Fourteenth Amendment confers rights upon states (as opposed to "persons"), which it does not. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966); *Wisconsin v. Zimmerman*, 205 F. Supp. 673, 675 (W.D. Wis. 1962).

a taxpayer and upon which the Wisconsin Supreme Court's interpretation of Section 381 could act as a limitation.

The companion to the principle of "apportionment" is the requirement of "nexus." Due process requires, in addition to a fair apportionment, that a state have some minimal connection ("nexus") with a business before imposing its tax. *Trinova*, 111 S. Ct. at 828; *Container Corporation*, 463 U.S. at 165.

DOR's analysis of Section 381 also mistakes the difference between these two requirements. DOR states that the statute was enacted to create an exception to "apportionment." Petition at 16. However, as the Court clearly explained in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972), Section 381 was enacted in response to the "nexus" requirement, not the requirement of fair apportionment. The statute addresses the level of activity in which a business can engage within a state's borders before becoming subject to taxation. Absent the statute, the quantum of "connection" necessary to support an exercise of state taxing authority was and is quite low. In Section 381, however, Congress, in the exercise of its power to regulate interstate commerce, has demarcated an activity—solicitation—in which businesses may engage within the borders of a state without subjecting themselves to taxation, even though a "nexus" sufficient to pass constitutional muster otherwise may exist.

It never has been disputed that Wrigley's business would have "nexus" with Wisconsin and would be subject to its jurisdiction to tax—in the absence of Section 381. DOR is simply attempting for the first time to craft a new rule of statutory construction sounding as if this case presents a constitutional issue. It does not.

2.

The major premise of DOR's argument is stated in terms which sound like a canon of statutory construction: Any statute which "override[s] the states' pre-existing powers or sovereign authority" must be construed narrowly. Petition at 12, 16. That premise is unsupportable in this case.

Even if there were such a canon, it would have no application in this case because Section 381 does not override any authority that belongs to the states. Section 381 does limit the states' ability to tax interstate businesses—but such regulation is completely within Congress's power under the Commerce Clause. *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150 (1979); *Heublein*, 409 U.S. at 282 n.9. *See also Wrigley*, A-26; *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So.2d 314, 322, *cert. denied sub nom. Mouton v. International Shoe Co.*, 379 U.S. 902 (1964). Not surprisingly, DOR raises no challenge to Congress's authority to enact this statute. Because interstate commerce is within the domain of Congress to regulate, there is no basis for the contention that Section 381's restriction of state taxation upon interstate commerce must be construed narrowly.

Furthermore, the canon DOR would have this Court apply does not appear to even exist. Certainly DOR cites no authority for such a canon. DOR does cite three decisions of this Court (Petition at 12, *citing Heublein*; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); and *Bowen v. American Hospital Association*, 476 U.S. 610 (1986)), but the rule applied by the Court in those cases is entirely different than the canon DOR tries to articulate here. None of those decisions command a particularly "broad" or "narrow" reading of a statute. Instead, those

cases stand for the entirely different proposition that the Court will not infer any restriction upon a state's internal powers which is not expressly stated in the federal statute. That rule is perhaps best stated in this Court's decision in *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), *cited in Bowen*, 476 U.S. at 644 n.33:

> An unexpressed purpose of Congress to set aside statutes of the states *regulating their internal affairs* is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous.

318 U.S. at 275 (emphasis added). This rule was applied in *Heublein*, where the Court determined that Congress's *explicit* prohibition of taxation upon interstate solicitation did not *implicitly* extend to local regulatory schemes which required taxpayers to engage in conduct that forced them to exceed the scope of protected solicitation, and thereby give up their immunity under Section 381. *Id.*, 409 U.S. at 279, 282.

The rule of construction illustrated by the cases cited by DOR does not support the supposed canon of construction which DOR attempts to articulate. Nor does the rule in cases like *Heublein* and *Penn Dairies* command that Section 381 be construed any differently than it was construed by the Wisconsin Supreme Court. The rule simply does not apply because the matter being regulated by Section 381—state taxation upon interstate commerce—is clearly within the domain of Congress to regulate, not within an internal state domain that is privileged from federal regulation.

In short, the major premise of DOR's argument is unsupportable and, as a consequence, the rest of the argument must fail.

3.

The final flaw in DOR's argument is that it overstates the effect of the Wisconsin Supreme Court's decision. DOR attempts to create the impression that the Wisconsin Supreme Court's decision is so unreasonably broad as to create the presumption that, in Wisconsin, interstate business is now immune from taxation. *See* Petition at 16-17.

DOR is exaggerating. The Wisconsin Supreme Court simply has applied the statute to the facts of this case, taking into account the commercial practicalities of promoting a perishable product and of administering a distant sales force. That interpretation is entirely consistent with the interpretations adopted and enforced in a number of other states. Indeed, this Court already has declined a request to review a similar interpretation adopted by the Supreme Court of Pennsylvania in *United States Tobacco Co. v. Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978).

Because the language of Section 381 readily supports the limited, commercially sensible interpretation of the term "solicitation" given the statute by the Wisconsin Supreme Court, there is no reason to review the Wisconsin Supreme Court's decision in this case.

II.

THE WISCONSIN SUPREME COURT DID NOT ERR IN CONSTRUING THE STATUTORY TERM "ONLY"

DOR also argues that the Wisconsin Supreme Court erred by holding Wrigley immune from taxation despite the fact that Wrigley engaged in certain activities which DOR contends were outside the scope of protected solicitation. DOR blames this result on an erroneous interpreta-

tion of whether the statute permits an exception for conduct which is *de minimis*. Petition at 19-21.

DOR's argument fails in three ways. First, DOR misreads the holding of the Wisconsin Supreme Court. The court did not hold that any of Wrigley's activities necessarily exceeded the scope of protected solicitation. To the contrary, the court held that all of Wrigley's activities in Wisconsin fell within the definition of solicitation employed by the court:

> In the context of the facts in this case and considering the nature of the chewing gum business, . . . we hold that each of Wrigley's activities in Wisconsin . . . were incidental to the solicitation of orders of gum.

(A-41.) In view of this holding, the issue in this case, if it were to be reviewed by this Court, would not be whether the statute permits an exception for *de minimis* activities. Rather the issue would be whether the particular activities in which Wrigley's employees in Wisconsin engaged can be viewed as "incidental to solicitation." This issue does not warrant review by this Court. The Court's inquiry would be fact-intensive and the Court's decision would have little application outside the unique circumstances of this case.

Second, to the extent that it is necessary to the Wisconsin Supreme Court's holding to recognize a *de minimis* exception, such an exception is well taken and is based on authority inherent in the courts which Congress did not intend to supersede.

DOR argues that the statute does not permit *any* kind of *de minimis* exception because the term "solicitation" is modified by the term "only." Review is necessary, DOR argues, because the Wisconsin Supreme Court's interpretation is so broad that the exception will become the norm and the statute will be interpreted to permit foreign corporations to "systematically" engage in sales activities outside the scope of solicitation. Petition at 20.

DOR's argument places too much emphasis on the term "only," and gives too little recognition to the plain meaning of the *de minimis* doctrine—that the law ignores trifles. Furthermore, in its attempt to add appeal to its argument, DOR unfairly characterizes the careful analysis and limited holding of the court below.

DOR asserts that the term "only" unambiguously expresses a legislative intent to foreclose any kind of *de minimis* exception. That conclusion is doubtful. The *de minimis* doctrine is a fundamental of our jurisprudence, an age-old principle that courts apply in all kinds of cases out of common sense and the need for practicality. *See, e.g., South Carolina v. Regan*, 465 U.S. 367, 400 (1984) (O'Connor, J., concurring) (recognizing Supreme Court exception to Anti-Injunction Act on basis of *de minimis* number of cases in which original jurisdiction of Supreme Court can be invoked); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 687 n.29 (1979) (*de minimis* exception to accounting requirements under Indian treaties); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned"); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 600 (1965) (*de minimis* exception to Section 7 of the Clayton Act); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (Rule 11, Fed.R.Civ.P., disregards *de minimis* violations); *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979).

If it were Congress's purpose to preclude the application of a rule as well-known and axiomatic as this, Congress would have supplied an explicit, express statement to that effect. Indeed, there is no indication whatsoever in the legislative history of Section 381 that Congress intended to relieve courts of their inherent power to disregard *de minimis* activity.

In applying Section 381, it does not make common sense to hold a taxpayer subject to taxation in a state where its activities are so minor that they have no impact upon the flow of interstate commerce. Nevertheless, DOR proposes that the Court review this case with an eye towards adopting just such an extreme interpretation of this statute. The Court should reject that invitation. The Court has always been chary to "impose grave legal consequences upon . . . distinctions that are of *de minimis* meaning and effect." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984), *quoting Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (intra-enterprise conspiracies under the Sherman Act).

Third, DOR's argument is suspect because it is so overstated. DOR argues that the effect of the Wisconsin Supreme Court's decision is to "*prohibit*[ ] taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum" of solicitation, and goes on to suggest that the standard is unworkable because "its bounds can never be ascertained in advance by the taxpayer or the state taxing authority." Petitioner's Br. at 19-20 (emphasis in original).

To say that the bounds of a *de minimis* test can "never be ascertained" is to ignore the obvious. A *de minimis* test is inherently quite limited in scope, and is geared

to a juridical principle that is well established in practice. DOR cannot seriously suggest that courts, taxpayers and taxing authorities will have difficulty gauging the scope of such an exception. Indeed, it strains credulity for DOR to contend that to recognize a *de minimis* exception to the standard contained in Section 381 will permit the exception to overcome the rule or pave the way for "systematic exploitation of a domestic market" by a foreign corporation. Petition at 20.

In fact, DOR itself built *de minimis* exceptions into its own regulations concerning interstate sales activities. Section Tax 2.8(3), Wis. Adm. Code (which was drafted after this case arose) describes DOR's view of the line between protected and unprotected activity under Section 381 and provides that foreign companies may engage in "usual or frequent" activity in the state without triggering tax liability. Implicit in such a regulation is the acknowledgement that unusual or infrequent (*i.e.*, *de minimis*) activity falling outside the scope of solicitation is insufficient to support tax jurisdiction. (Section Tax 2.8(3) is quoted at A-179 - A-180; *see also* A-185 - A-186 (Commissioner Bartley, dissenting).) Similar guidelines promulgated by the Multistate Tax Commission, upon which the TAC relied in deciding this case (Petition at 8), also recognize that infrequent or insubstantial activities outside the scope of protected solicitation should not relieve a taxpayer of its immunity under Section 381. *See* A-249 - A-251 (for example, "minor" in-state advertising is considered to be an immune activity; likewise, maintaining an in-state display room subjects a business to taxation, unless the room is rented for two weeks or less).

In sum, the Court should deny the writ sought by DOR because the Wisconsin Supreme Court did not err in holding that all of Wrigley's activities in Wisconsin constituted

solicitation, or, to the extent they fell outside its scope, were *de minimis* and should be disregarded.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT IS CONSISTENT WITH THE WELL-REASONED DECISIONS OF OTHER COURTS OF LAST RESORT

DOR contends that, whether the Wisconsin Supreme Court correctly construed the statute or not, courts of last resort around the country have come to differing interpretations of the statute, and Supreme Court review is needed to clarify its meaning.

The conflict asserted by DOR is one of appearance, not substance.[5] One reason the conflict is more apparent than real is that most of the published cases have been decided strictly on their facts, without any effort given to formulating a rule to govern other cases on other facts. *See, e.g., Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971). Furthermore, many cases that do attempt to articulate some starting point in their analysis depend heavily upon the labels "strict" or "broad." But those labels have little meaning in practice. A strict view of the statute that leads to a loss of immunity in one factual context might be broad enough to prohibit taxation in the factual context of a different case. Indeed, defining "solicitation" according to labels such as "broad" or "narrow" merely begs the question. Those are relative terms. Without being tethered to some *standard*, they are

[5] It is telling that, in categorizing the published cases which supposedly conflict with the decision below, DOR does not venture further than to say how a given decision is "perceived" to have interpreted Section 381. *See* Petition at 22, n.1-3.

meaningless. But neither DOR nor most of the cases it cites offer such a standard.

Few published decisions have devoted the effort that the Wisconsin Supreme Court did to analyze the statute and the intent of Congress. Most do not articulate the rule or standard which guided them to their decision (or which might guide this Court to its decision). For example, in *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979), from which the DOR quotes extensively, the Georgia Supreme Court described some alternative definitions of the term "solicitation," but declined to decide which one to apply, because the taxpayer's activities exceeded all three. As a result, those cases are persuasive only insofar as their facts bear similarity to the facts before this Court—which they do not.

The only valid way to judge whether any conflict exists in this area of the law is to review the holdings of those cases that articulate some standard for how Section 381 should be applied. *U.S. Tobacco* was one such case. There is no conflict between the holding of *U.S. Tobacco* and the decision below—in fact the Wisconsin Supreme Court relied upon *U.S. Tobacco* to reach its decision. (A-36 - A-37.) This Court was asked to issue a writ to review the decision in *U.S. Tobacco*. Among the grounds asserted by the petitioner was that there was a supposed conflict among the holdings of courts of last resort regarding the scope of the term "solicitation." *See* Petition for Writ of Certiorari at 9-10, *Commonwealth of Pennsylvania v. U.S. Tobacco Company*, No. 77-1780, *cert. denied*, 439 U.S. 880 (1978). The Court denied the writ, however, and declined to review that purported conflict.

Since that decision in 1978, only three courts of last resort, according to the list in the Petition, have published opinions that are "perceived" to construe Section 381 dif-

ferently than the Wisconsin Supreme Court did in the case below: Alaska, in *Sjong v. State Department of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); North Dakota, in *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985) and Arkansas in *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990).

However, the decisions of these three courts are not substantially in conflict with the decision in *U.S. Tobacco* or with the decision below. *Sjong* is not in conflict because that court did not construe the term "solicitation." It had no need to; the taxpayer was delivering his product (fish) from a point within the state and selling it there, which obviously falls outside the scope of subsection 1 of the statute, without regard to whether any other conduct fell within the scope of "solicitation." *See Sjong*, 622 P.2d at 975.

Nor do *Drackett* and *Martin* present a conflict warranting review by this Court. In neither of these cases did the courts give sufficient analysis of the facts and the statute to predict whether, if presented with the facts of *this* case, they would have decided it differently. In *Drackett*, the Court stated without analysis its agreement with those courts perceived to apply the so-called "intermediate" definition. *Id.*, 370 N.W.2d at 726. It performed no analysis of their reasoning and gave no reason why the holdings of one group were any different from or superior to the holdings of another. Likewise, in the Arkansas Supreme Court's decision in *U.S. Tobacco v. Martin*, the court rejects the holdings of cases like *Wrigley* and *U.S. Tobacco*, but does so without any explanation whatsoever to justify its holding. Wrigley respectfully submits that these two cases do not pose a clear conflict with the decision below so as to warrant this Court's review.

DOR gives one other reason why this Court must issue a writ in this case. DOR argues the lack of a uniform federal statutory standard leads to situations where multistate operations either escape tax or are subjected to multiple taxation, through so-called "nowhere" sales and "throwback" rules.

To the extent this is a problem, it is one that does not warrant review, and need not be remedied by the "extensive judicial lawmaking" that would be required of this Court to create uniformity. *See Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 278 (1978). States have the power and have taken the initiative to account for sales that otherwise escape taxation. *See, e.g., GTE Automatic Electric, Inc. v. Allphin*, 68 Ill. 2d 326, 369 N.E.2d 841 (1977). As long as states can solve any problem of overlap or underlap (including those created by their own judicial interpretation of Section 381), a uniform interpretation by the Supreme Court is not necessary.

Furthermore, whether the lack of uniformity asserted by DOR is a problem or not, solving it involves a policy choice that is not this Court's to make:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

Moorman Manufacturing Co. v. Bair, 437 U.S. at 280.

In short, neither the purported conflicts among courts of last resort nor the lack of uniformity alleged by DOR warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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August 16, 1991

No. 91-119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

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STATE OF WISCONSIN
TAX APPEALS COMMISSION

****

WILLIAM WRIGLEY JR. COMPANY Wrigley Building 410 North Michigan Avenue Chicago, IL 60611 Petitioner, v. WISCONSIN DEPARTMENT OF REVENUE P.O. Box 8933 Madison, WI 53708 Respondent.	*	DOCKET NO. I-8591 FORMER COMMISSIONER SMITH'S IMPRESSIONS AS TO CREDIBILITY OF WITNESSES KROYER AND HECHT

****

Since the 1985 Wisconsin Legislature and Governor had cut short the terms of office of all members of the Wisconsin Tax Appeals Commission, but I was the only member not reappointed by Governor Earl, my term ended on October 7, 1985 (three days before the 326-page transcript/ herein was released by the private court reporter).

After extensive briefing by both parties, on November 18, 1986, the Commission (consisting of the four continuing members and my successor, who had been appointed from Respondent's legal staff) found sufficient nexus to impose Wisconsin's corporate franchise tax on Petitioner, which thereupon petitioned for review in Circuit Court

for Dane County. On August 20, 1987, Judge Nowakowski remanded this case to the Commission, for my "impressions of the credibility of the witnesses [Kroyer and Hecht] and the weight to be accorded to their testimony."

I found Witnesses Kroyer and Hecht's testimony (August 27 Transcript, pages 2 through 97, and 97 through 166, respectively) extremely credible. Respondent having offered nothing to controvert them, I would have proposed Findings of Fact, Conclusions of Law, and Order in favor of Petitioner, on its Petition for Redetermination.

I do not interpret Judge Nowakowski's decision as to require such Findings, Conclusions, and Order from me; but I am prepared to do so (or to cite specific instances of said witnesses' credible testimony) if so requested by either the Commission or Judge Nowakowski.

Dated October 12, 1987, at Madison, Wisconsin.

Respectfully submitted,

/s/ William Bradford Smith
William Bradford Smith
former member, Wisconsin
Tax Appeals Commission

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM WRIGLEY, JR. COMPANY	:	DECISION
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9A of the Tax Law for the Years 1975 through 1980.	:	

Petitioner, William Wrigley, Jr. Company, 410 North Michigan Avenue, Chicago, Illinois, 60611, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the years 1975 through 1980 (File No. 39340).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, W. Averell Harriman State Office Building Campus, Albany, New York 12227 on February 24, 1986 at 1:15 P.M., with all briefs to be filed by May 26, 1986. Petitioner appeared by Baker & McKenzie (H. Randolph Williams, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner's activities within New York State during the years at issue constituted the solicitation of

orders, as defined by 15 U.S.C. §381 *et seq.*, thereby precluding this State from imposing a tax on petitioner's income.

FINDING OF FACT

1. Petitioner is an Illinois corporation which is engaged in the manufacture and sale of chewing gum. Its principal place of business is located in Chicago, Illinois.

2. On September 14, 1979, petitioner filed a timely claim for refund in the amount of $92,357.69 plus interest for New York State corporation franchise tax paid by it for its taxable year ended December 31, 1975.

3. On October 17, 1979, petitioner filed the following timely claims for refund of franchise tax paid by it:

Period Ended	Amount of Claim
December 31, 1976	$121,542.79 plus interest
December 31, 1977	100,734.61 plus interest
December 31, 1978	105,784.25 plus interest
December 31, 1979	18,000.00 plus interest

4. In 1981, the Audit Division conducted a field audit of petitioner's franchise tax reports for the periods ended December 31, 1978 through December 31, 1980. As a result of that field audit, the Audit Division proposed to disallow the claims for refund described in Findings "2" and "3" above, and to assert the following deficiencies in the franchise tax:

Period Ended	Amount of Deficiencies
December 31, 1978	($214.00) tax reduction
December 31, 1979	$76,056.00
December 31, 1980	$30,840.00

5. On January 6, 1982, petitioner timely protested the proposed deficiencies and denial of claims, described in Finding "4" above.

6. On April 12, 1982, the Audit Division issued the following notices of deficiency:

Period Ended	Tax	Interest	Total
December 31, 1978	$ 169.00	$ 54.00	$ 223.00
December 31, 1979	76,650.00	17,868.00	94,518.00
December 31, 1980	30,964.00	4,586.00	35,550.00

These notices of deficiency constituted a denial of the claims for refund described in Findings "2" and "3" above.

7. On May 11, 1982, petitioner timely filed its petition to redetermine the deficiencies and disallowance of refunds, described in Finding "6" above.

8. The facts relevant to petitioner's claims are the same for all taxable years in question.

9. Petitioner employed approximately 30 sales representatives who operated in New York State. Sales representatives were responsible to a regional sales manager. The regional sales manager, in turn, reported to a district manager who maintained an office in Saddlebrook, New Jersey. Petitioner did not maintain a place of business in New York during the years in question.

10. During the year 1979, petitioner established a program known as "Key Account Manager". An individual assigned to this program was given the duty of trying to increase the sales volume of established high sales volume accounts.

11. Petitioner paid each sales representative a salary, and provided the use of an automobile which was owned

by petitioner. Petitioner reimbursed the sales representatives for the operation and maintenance expenses, including storage, of the automobile assigned to each representative. In all cases where a sales representative rented garage space to store the automobile, such space was rented by the representative individually and not in the name of petitioner.

12. Petitioner's sales representatives called upon "direct" customers to increase distribution of petitioner's products. A direct account is one which buys product directly from petitioner and includes wholesalers, large retail chains, and suppliers of vending machines. The goal of a sales representative when he called upon a direct account was to increase distribution of petitioner's products. A sales representative would seek to assure that the direct account carried as close to 100 percent of petitioner's product lines as possible. In order to increase distribution, the sales representative called upon the direct account to initiate an order, to inform that individual of promotional campaigns and to encourage the optimal display of petitioner's products at the retail level. The direct account could submit an order to purchase petitioner's product, which the sales representative would then submit to the petitioner's district office in Saddlebrook, New Jersey for approval. From Saddlebrook, the order would be forwarded to the Chicago office for processing.

13. Petitioner's sales representatives also called upon "indirect" customers to increase distribution of petitioner's product. An "indirect" account, usually an independently owned retail store, is one which purchases a product from a direct store.

14. The goal of a sales representative when he visited an indirect account was to increase the distribution of petitioner's products through increased purchases by the in-

direct account from the direct account. When the sales representative visited an indirect account the representative would check displays of petitioner's products for out-of-stock products, out-of-date products, the location of the product and the number of product lines displayed. A sales representative would also explain current promotional and advertising campaigns.

15. Since a fresh product was necessary for continued sales, if a representative found out-of-date product in a display the representative would exchange, on a stick-for-stick basis, the out-of-date product with fresh product drawn from a small stock of product in his possession. Petitioner did not charge the indirect account for this exchange. The supplies of petitioner's products which were held by the sales representatives at any time, therefore, consisted of both salable and unsalable product and had negligible value.

16. On occasion, a sales representative replaced either out-of-date or undisplayed product with stock in an indirect account's storage area.

17. Occasionally, petitioner supplied an indirect account with a display stand on which to display petitioner's product. Petitioner's sales representatives would also participate either alone, or with sales representatives of other companies, in the arrangement of the displays. Petitioner supplied these display stands to a retailer free of charge and did not own the stands or consider the stands to be inventory. The stands were purchased from suppliers throughout the United States and were often shipped directly to a customer.

18. Petitioner had no telephone listing or mailing address in New York State during the taxable years in question.

19. All manufacturing activities by petitioner were performed outside New York State during the taxable years in question.

20. Petitioner maintained no stock of goods, raw materials, or supplies in New York State during the taxable years in question.

21. Petitioner owned no tangible personal property in New York State during the taxable years in question other than its product carried by the sales representatives, and the automobile which the sales representatives used as transport between customers.

22. All sales by petitioner to New York customers were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State.

23. Petitioner did not repair or service its products after sale.

24. Petitioner's sales representatives gave no technical advice on the use of its products.

25. In accordance with the State Administrative Procedure Act §307(1), petitioners [sic] proposed findings of fact have been generally accepted. It is noted, however, that proposed finding of fact "8" has been rejected as being in the nature of legal argument.

CONCLUSIONS OF LAW

A. That 15 U.S.C. §381 (PL 86-272) states, in pertinent part:

> "(a) No State . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the

> only business activities within such State by or on behalf of such person . . . are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
>
> (b) The provisions of subsection (a) shall not apply to the imposition of net income tax by any State . . . with respect to—
>
> (1) any corporation which is incorporated under the laws of such State; or
>
> (2) any individual who . . . is domiciled in, or a resident of, such State."

B. That in order to be exempt from corporation franchise tax, the activities of the employees of the corporation must be limited to solicitation (20 NYCRR 1-3.4[b][9][iv], effective January 1, 1976). Further, the term solicitation is to be narrowly construed (*id.*) However, "[s]ome activities incidental to offering tangible personal property for sale or pursuing offers for the purchase of tangible personal property will nevertheless be considered solicitation and will not make the corporation taxable." (*Id.*)

C. That upon all of the facts and circumstances presented, we find that petitioner's activities constituted solicitation within the meaning of 15 U.S.C. § 381 thereby

precluding New York from imposing a tax on petitioner's income. In reaching this conclusion it is noted that in *Matter of Gillette Co. v. State Tax Commn.*, (56 AD2d 475, *affd* 45 NY2d 846) the Court of Appeals held that activities substantially identical to those of petitioner were exempt from corporation franchise tax. In *Gillette*, as in this case, petitioner had no place of business, telephone listing or mailing address in New York, all manufacturing activities were performed outside of the State, petitioner maintained no stock of goods, raw materials or supplies in New York, the product carried by the sales representatives was of negligible value, sales representatives advised indirect accounts as to display techniques and all sales by petitioner were shipped via a common carrier from outside New York State pursuant to orders accepted by petitioner outside New York State. It is noted that, under the circumstances presented herein, the replacement of stale product with fresh product did not exceed the limits of solicitation (*see United States Tobacco Co. v. Commonwealth*, 386 A2d 471 [Pa] which was relied on by the Court in *Matter of Gillette Co. v. State Tax Commn.*, 45 NY2d 846, *supra*). Moreover, the fact that petitioner owned automobiles which were used in the state is of no consequence (20 NYCRR 1-3.4[b][9][iv][C]; *United States Tobacco Co. v. Commonwealth*, *supra*).

D. That the petition of William Wrigley, Jr. Company is granted, and the notices of deficiency issued April 12, 1982 are cancelled and the claims for refund are granted.

DATED: Albany, New York
March 11, 1987

STATE TAX COMMISSION

/s/ Roderick G. W. Chu
President

/s/ Francis R. Koenig
Commissioner

/s/ Mark Friedlander
Commissioner

Supreme Court, U.S.
FILED
AUG 19 1991
OFFICE OF THE CLERK

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY THE STATE OF IOWA AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory states submit this Brief as Amici Curiae in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 37.5.

II. INTEREST OF AMICI CURIAE

At issue in this case is the proper interpretation of a federal statute commonly referred to as Public Law 86-272 (codified at 15 U.S.C. § 381). This federal statute restricts a state's right to impose a net income tax, as defined in 15 U.S.C. § 383, on income derived within such state and, therefore, is applicable to the Amici because they impose such taxes.

The signatory Amici States impose either net income taxes or franchise taxes measured by net income which are implicated by P.L. 86-272. Michigan also uses P.L. 86-272 as a guide to determine nexus for imposition of other taxes. The Amici believe that the Wisconsin Supreme Court's decision in this case incorrectly interprets P.L. 86-272. They desire a decision from this Court as to the proper legal standards to be employed in application of the statute. The many hopelessly conflicting state court decisions regarding the legal standard to apply in determining whether a taxpayer is immunized from a state's net income tax by P.L. 86-272 have created uncertainty for tax administrators and taxpayers.

III. SUMMARY OF ARGUMENT

State courts of last resort have interpreted P.L. 86-272 in conflicting ways, applying drastically different legal standards in determining whether an out-of-state corporation is immune from a state's net income tax. The lack of a definitive uniform interpretation of the federal statute creates inequities and problems for states and taxpayers. Public Law 86-272, as a federal statute, should have a uniform interpretation which only this Court can provide. The Wisconsin Supreme Court and some other courts have interpreted P.L. 86-272 in a way which overly restricts the power of the states to impose a net income tax. Therefore, this case involves an important question of federal law which needs to be settled by the United States Supreme Court so as to give guidance to state courts with respect to the interpretation of the federal statute.

IV. ARGUMENT

Public Law 86-272 provides, in relevant part:

Minimum Standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(Emphasis added.)

Public Law 86-272 was discussed by this Court in *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), in which the Court stated:

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357, 67 A.L.R.2d 1292 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U.S., at 452, 3 L.Ed.2d 421. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381] within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere*

> *solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was Congress' primary goal.*

409 U.S. at 279-80 (footnotes omitted; emphasis added).

"Clarity which would remove uncertainty" has not been achieved. In fact, "solicitation" has been "a definitional quagmire." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:11, at 390 (Supp. 1990). State courts of last resort disagree on the legal standards both as to the quality and quantity of acts which a company may do in a state and still be exempted from that state's net income tax by P.L. 86-272. The interpretations of the phrase "solicitation of orders" range from a narrow strict view to the extremely broad view of the Wisconsin Supreme Court in this case.

In *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557, 562 (1971), the Court concluded, "The legislative history of the act clearly indicates that a narrow construction of the term 'solicitation of orders' was intended by Congress." The Alaska Supreme Court narrowly construed P.L. 86-272 in *Sjong v. Alaska Dept. of Revenue*, 622 P.2d 967, 975 (Alaska 1981). A narrow interpretation was recently reaffirmed by the Supreme Court of Arkansas in *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 258 (Ark. 1990). In a case involving the same taxpayer,

U.S. Tobacco Co., the Supreme Court of Pennsylvania concluded that the legislative history of P.L. 86-272 supported its broad view that "solicitation" involved "sundry activities so long as those activities were closely related to the eventual sale of a product." *U.S. Tobacco Co. v. Pennsylvania*, 386 A.2d 471, 478 (Pa. 1978), *cert. denied*, 439 U.S. 880 (1978). "[A]cts of courtesy . . . in order to satisfy or accommodate customers" and any other acts "inextricably related to solicitation" may be performed by a company in Pennsylvania without the company losing its P.L. 86-272 immunity. The dissenting opinion in the Pennsylvania case makes it clear that U.S. Tobacco did substantially the same activities in Pennsylvania as it did in Arkansas. Yet, in Pennsylvania it is immune from income tax and in Arkansas it is not.

Other cases adopting a broad interpretation of "solicitation" include *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981), and *Gillette Co. v. State Tax Comm.*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 45 N.Y.2d 846, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978). These cases adopt the same legal standard for "solicitation of orders" as the Pennsylvania Supreme Court applied in *U.S. Tobacco* and as the Wisconsin Supreme Court employed in the instant case.

A middle view extends P.L. 86-272 immunity to the "generally accepted or customary acts in the industry which lead to the placing of orders, not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training." *Olympia Brewing Co. v. Department of Revenue*, 5 Or. Tax 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974). "Presale activities

are distinguishable from similar activities that constitute services after the sale." *Id.* The Oregon Supreme Court gave the term "solicitation" "its generally accepted meaning in the light of its legislative history." *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081, 1083 (1976). In *Drackett Products Co. v. Conrad*, 370 N.W.2d 723, 726 (N.D. 1985), the North Dakota Supreme Court stated that a business exceeds "solicitation of orders" for purposes of P.L. 86-272 "if its activities go beyond acts necessary for and leading to the placing of orders." "[I]f an out-of-state business engages, within [North Dakota], in other ongoing activities which are commonly associated with maintaining a business operation, it is not exempt from North Dakota taxation under 15 U.S.C. § 381." 370 N.W.2d at 726.

Contrary to the standard applied by the Wisconsin Supreme Court, some courts believe that the fact that a company's activities in a state "will eventually result in increased orders" does not blanket all of those activities with the protection afforded by P.L. 86-272. *See, e.g., Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, 218 (1970), *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971). "[F]unctions more commonly related to maintaining an on-going business operation," "generating greater income than could be achieved simply through the solicitation of orders," have been held not immunized by P.L. 86-272. *See National Tires, Inc. v. Lindley*, 68 Ohio App. 2d 71, 426 N.E.2d 793, 798 (1980). Also, whereas the Wisconsin Supreme Court said that "the court must consider the type of business involved" (465 N.W.2d at 811-12), Oregon has recognized that "[m]any businesses, by their very

nature, cannot claim the benefits of the federal statute. . . . " *Olympia Brewing Co. v. Dept. of Rev.*, 5 Or. Tax 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (Ore. 1973), *cert. denied*, 415 U.S. 976 (1974).

In addition to conflicting interpretations regarding the *nature* of the acts immunized by P.L. 86-272, there is a conflict in the state courts' decisions concerning the *quantity* of nonsolicitation activities that may be performed. The Wisconsin Supreme Court stated (465 N.W.2d at 811) that any activities by Wrigley within the state "that could be considered as somehow not being inextricably bound up in solicitation . . . are so minor as to be *de minimis*" and not of "sufficient weight" as to remove Wrigley from the protection of P.L. 86-272. Some other courts have also adopted a *de minimis* standard. *See, e.g., Coors Porcelain Company v. Colorado*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *John Ownbey Co. v. Butler*, 211 Tenn. 336, 365 S.W.2d 33 (1963); *Indiana Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981). Commentators have criticized courts which adopt a *de minimis* exception for unprotected activities. *See* Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 305, 311 (Winter 1985); Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 381, 384-85 (1976); P. Hartman, *Federal Limitations on State and Local Taxation* § 9:12, at 504, 507 (1981). Other courts have made it clear that a *de minimis* standard does not apply. For example, in *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 260 (Ark. 1990), it was "not the frequency of the visits or volume of sales" upon which the decision turned. The Court was "concerned with the *nature* of the

Company's activities" *Id.* In *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. banc 1990), the Court stated that "it is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability." *See also Chattanooga Glass Company v. Strickland*, 244 Ga. 603, 261 S.E.2d 599, 601 (1979) (taxpayer exceeded "solicitation" when it remedied complaints a few times per year within the taxing state). There is no textual support in P.L. 86-272 for a *de minimis* exception for nonsolicitation activities. The statute clearly states that "the only business activities" in the taxing state must be limited to "the solicitation of orders." This conflict among state courts of last resort regarding the use of a *de minimis* standard needs to be resolved.

Public Law 86-272 was enacted largely because "[p]ersons engaged in interstate commerce [were] in doubt as to the amount of local activities within a State that [would] be regarded as forming a sufficient 'nexus.' " S. Rep. No. 658, 86th Cong., 1st Sess., at 2; U.S. Code Cong. & Admin. News 1959, p. 2549. The Senate Committee on Finance, which reported the original bill, "believe[d] that, unless some certainty is restored to this area, the economic implications for the economy of the entire Nation may be unfortunate." S. Rep. No. 658, 86th Cong., 1st Sess., at 2; U.S. Code Cong. & Admin. News 1959, p. 2550. The Committee discussed several of those implications.

Because of the variety of interpretations given to P.L. 86-272 by state courts and tax administrators, the uncertainty which led to P.L. 86-272 has increased. Tax administrators are uncertain which legal standard to apply, and taxpayers are uncertain whether they should file returns in states where they are not domiciled or incorporated.

States invest time and expense in investigating, auditing, and litigating to defend their interpretation of P.L. 86-272. Taxpayers immunized by P.L. 86-272 under some states' interpretations of the federal statute must pay a net income tax to other states as a result of different interpretations even though their activities are the same in those states. Clearly, there needs to be a uniform interpretation in all states of P.L. 86-272. "[T]he failure to have trustworthy guidelines on the meaning of 'solicitation of orders' and 'delivery' is most unfortunate for *both* the taxpayer and the taxing authority." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 518 (1981). Only this Court can provide these vital "trustworthy guidelines."

The Wisconsin Supreme Court decision, interpreting P.L. 86-272 broadly to immunize from state net income tax a corporation with a multitude of activities within the state, conflicts with the plain language of the statute, the legislative history, and this Court's language in *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). As this Court pointed out in *Heublein*, the "legislative history of § 381 shows that Congress had rather limited purposes." 409 U.S. at 279. Also, " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. [Citation omitted.]' " 409 U.S. at 281-82. The Wisconsin Supreme Court's decision drastically alters the federal-state balance, interpreting P.L. 86-272 in a manner which greatly restricts states' power to tax. "Congress is presumed to respect state sovereignty and traditional state powers unless, and only to the extent, that it explicitly limits those powers." *U.S. Tobacco Co. v. Pennsylvania*, 386 A.2d

471, 482 (Pa. 1978) (dissenting opinion), *cert. denied*, 439 U.S. 880 (1978). If Congress had intended to immunize from taxation all sales-related activities in the taxing state by out-of-state companies, it could easily have said so. Congress did not say that out-of-state merchants which did not own property in a state could not be required to pay state income tax, even though all activities of the merchants would presumably be directed toward increasing future orders. There was no intent to eliminate such a huge portion of states' tax bases upon which they rely. In fact, a proposed bill which would have prevented states from imposing a net income tax on a business unless it maintained an office, salable inventory, warehouse or other place of business, or had an agent who maintained an office or other place of business in the state was rejected. *See* H.R. 936, 86th Cong., 1st Session (1959) (reporting H. J. Res. 450); S. J. Res. 113, 86th Cong., 1st Sess. (1959).

The overly broad interpretation of "solicitation of orders" "not only results in unfair loss of revenue to the taxing States, but local business suffers a competitive handicap since it must shoulder the tax burdens which the out-of-state seller has unfairly escaped by reason of Public Law 86-272." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 517-18 (1981). The broad interpretation used by the Supreme Court of Wisconsin allows an out-of-state company to do practically anything in a state that a local company would do, and benefit from the same state services as the local company, but not pay any tax to the state to help pay for those services. The local company is not protected by P.L. 86-272, and if the state cannot tax out-of-state companies, local companies

have to carry a greater share of the tax burden. The typical small business, domiciled in and taxed upon its profits by a state, will not be able to compete with a large multistate operator who pays no state income taxes where he sells his products.

V. CONCLUSION

Wisconsin's Petition raises issues which have a significant impact in the field of state taxation of income and are of vital concern to the Amici. The Petition raises important questions of federal law which have not been, but should now be, settled by this Court. Those questions of federal law have been decided by the Wisconsin Supreme Court in a way that conflicts with decisions of other state courts of last resort. Therefore, we urge this Court to grant Wisconsin's Petition for a Writ of Certiorari and to give plenary consideration to the matter.

Respectfully submitted,

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(4)

No. 91-119

Supreme Court, U.S.
FILED
NOV 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

JOINT APPENDIX

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Certiorari Granted October 7, 1991

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The following memorandum decisions, orders and judgments have been omitted from the joint appendix because they are printed in the appendix to the petition for certiorari:

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William Wrigley Jr. Co. v. Wisconsin Department of Revenue; Wisconsin Department of Revenue v. William Wrigley, Jr. Co., Dane County Circuit Court, Case Nos. 85-CV-6679, 86-CV-7696 (August 20, 1987) A-204

William Wrigley, Jr. Co. v. Wisconsin Department of Revenue, Wisconsin Tax Appeals Commission, Docket No. I-8591 (November 18, 1986) A-218

RELEVANT DOCKET ENTRIES

DATE	ITEM	LOCATION
12/23/87	Petition For Review No. 87-CV-7468	R. 1
12/28/87	Petition For Review No. 87-CV-7478	R. 2
1/11/88	Notice Of Appearance No. 87-CV-7468	R. 3
1/14/88	Notice Of Appearance No. 87-CV-7478	R. 4
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11/3/88	Notice Of Entry Of Decision And Order	R. 12
12/27/88	Notice Of Appeal	R. 13
10/7/91	Order Granting Writ Of Certiorari	JA-1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 7, 1991

Mr. F. Thomas Creeron
Assistant Attorney General
Post Office Box 7857
Madison, WI 53707-7857

Re: Wisconsin Department of Revenue
v. William Wrigley, Jr., Co.
No. 91-119

Dear Mr. Creeron:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The case is set for oral argument in tandem with No. 91-194, Quill Corp. v. North Dakota.

Very truly yours,

/s/ William K. Suter

William K. Suter, Clerk

PROCEEDINGS BEFORE THE WISCONSIN
TAX APPEAL COMMISSION

TRANSCRIPT OF 8-26-85

[23]

Q If you please, would you state your name for the record and spell your last name?

A My name is Carl Bjorndahl, and my last name is spelled B-j-o-r-n-d-a-h-l.

. . . .

[25]

Q Now, you have indicated that you were assistant controller from late '69?

A I'm sorry. It was '76 that I was made the assistant controller. I just looked at a note I had here. I was hired in '63 as tax manager assistant controller from March of '76 through March of '83 at which time I was made manager of tax compliance systems.

Q During the period of 1973 through 1978, were you involved in state income tax matters for the Wrigley Company?

A I was involved in state and local tax matters, that is correct. Correct.

Q You understand the proceedings we are involved in today concern a Petition by the Wrigley Company challenging the assessment of income tax against the Wrigley Company from the years 1973 to 1978?

A Yes, I do.

Q Did the Wrigley Company file income tax returns in Wisconsin for those years?

A No, they did not.

Q Has the Wrigley Company ever filed income tax returns in the State of Wisconsin?

A No, they have not.

Q Were you involved in the decision not to file tax returns in the State of Wisconsin for the years 1973 to 1978?

[26]

A Yes. I was involved in discussions with management about our activities in the state, and upon consultation with legal counsel, we were advised and the decision was made not to file in the State of Wisconsin as we had protection under Public Law 86-272.

Q Were Wisconsin sales included in the sales tax in the sales factor in filing your Illinois State income tax returns for the years 1973 through 1978?

A Yes, they were.

Q Mr. Bjorndahl, I assume that the Wrigley Company files income tax returns in the State of Illinois?

A Yes, they do.

Q That is the state where Wrigley has it's corporate headquarters; is that correct?

A That is correct.

Q In addition to the State of Illinois, has the Wrigley Company at any time filed an income tax return in other states based upon the location of offices or manufacturing facilities in those states?

A Yes.

Q Has the Wrigley Company filed income tax returns in the State of Florida?

A We have. We have a sales office in Florida.

Q And in the State of Georgia?

A Yes, we have a manufacturing facility in Georgia.

[27]

Q State of Ohio?

A Ohio, we have an office.

Q And similarly with respect to the State of Michigan?

A Yes, we have inventory and an office in the State of Michigan.

Q Has the Wrigley Company, during the years that we are talking about, also filed in the State of California?

A Yes. We have a manufacturing facility and two sales offices in California.

Q During those years have they also filed in the State of Hawaii?

A Yes, we have storage of finished product, gum.

Q And similarly has the Wrigley Company filed in the State of Oregon?

A Oregon has a warehouse for the storage of finished product and an office.

Q And finally, has the Wrigley Company, during those years in question, presently file in the State of New Jersey?

A Yes, they are. We have a sales office in New Jersey plus a warehouse.

. . . .

[28]

Q Will you state -- I'm sorry. Are there any other states other than those we have mentioned in which the Wrigley Company has a sales office, a manufacturing facility, or a warehouse and for that reason has filed a state income tax return?

A No.

Q Now, in addition to those states which we have just named, it is my understanding that the Wrigley Company has at one time or another filed or agreed to pay tax by way of settlement in four other states; is that correct?

A That is correct.

Q Is one of those states the State of Pennsylvania?

A Yes, it is.

Q Do you recall the reason for Wrigley's filing in the State of Pennsylvania or the circumstances surrounding the filing in Pennsylvania?

A Wrigley was required to file a tax return in the State of Pennsylvania, and we had land located in the State

of Pennsylvania that we had bought for a potential factory; and therefore, there were filing taxes. However, we have since filed against -- filed a suit to refund -- for refund to the State of Pennsylvania and have received refunds for the years 1965 through 1981 and have been held not to be subject in the State of Pennsylvania and are currently paying tax only to the State of

[29]

Pennsylvania, a franchise tax, on the value of the land that we own and on the net rental income from land from an intended farm that we have in State of Pennsylvania; and we are paying no taxes on chewing gun activities in the State of Pennsylvania.

Q Okay. So any taxes paid in the State of Pennsylvania relate exclusively to the presence of the farm land and to farm operations in connection with that farm land?

A That is correct.

A There are no taxes paid with respect to sale of gum in the State of Pennsylvania?

A That is correct.

Q Mr. Bjorndahl, I'm going to show you what has been marked as Exhibit A. Could you identify that for me, please?

A Yes, I have seen this. This was formerly the letter we received from our Attorney Peter Picotte with the settlement of Pennsylvania.

Q And does that letter, set forth in Exhibit A, accurately describe the circumstances in the settlement with Pennsylvania?

A Yes, it does.

. . . .

[30]

Q It's my understanding, Mr. Bjorndahl, that the Wrigley Company has also paid a small amount of money via settlement in the State of Alabama; is that correct?

A That is correct.

Q Can you tell me the circumstances surrounding that settlement in Alabama?

A We received a letter from the State of Alabama requesting the William Wrigley Junior Company to file tax returns from 1932 forward based on the State's contention that we were doing business in Alabama. And upon discussions with management and with outside legal counsel, the Wrigley Company felt that we were not subject to the tax, but because of the amount of administrative duties involved and work involved and the cost of trying to develop tax figures for forty-three years, counsel suggested that we make a settlement to pay taxes in the State of Alabama for the years '74 forward and therefore, limiting the large amount of legal costs and administrative time and effort and labor on the part of

[31]

the Wrigley Company because it would not be worth the effort.
And so through our attorneys we agreed with the State of Alabama to file tax returns for the years 1974 forward. However, in most of the cases -- in fact all the cases -- I recall each of the years the reduction in the Illinois income tax was greater than the tax cost in Alabama, and from a business sense, the company

decided to make a settlement rather than to go into litigation and incur all those costs of litigation.

Q Do I understand that the notice from Alabama came in 1976?

A 1976, right. That's correct.

Q And it requested a filing of returns going back to 1932?

A That is correct.

Q And as a result of your discussions with the State of Alabama, the Wrigley Company agreed to pay tax for the years 1974 and 1975; it that correct?

A Right, that is correct.

Q And the amount of tax involved in those years for the year 1974 was two thousand seven hundred eighty-five dollars; is that right?

A That is correct.

Q And for the year 1975, it was six thousand nine hundred and fifty-three dollars?

[32]

A That is correct.

. . . .

[33]

Q Similarly to the State of Alabama, it's my understanding that in 1981 Wrigley agreed to settle with the State of North Dakota for a total payment for the years 1970 through 1979 of tax, interest, and

penalties of less than fifteen thousand dollars; is that correct?

A That is correct.

Q Was the decision to settle in North Dakota also a business decision which resulted from weighing of cost factors rather than agreement or assessment of the merits?

A Yes. The people involved with the tax, myself and the president of finance and discussions with outside counsel and looking at the total costs of the assessments involved with North Dakota, felt that the cost of litigation, administrative costs, and time and effort of people was excessive; and therefore, we would agree to pay the tax through the year 1982 and settle it on that basis. And then subsequently, the State of North Dakota has since agreed that the Wrigley Company is no longer subject to North Dakota tax and is not subject to filing returns from 1983 forward, that our activities are within the Public Law 86-272.

Q Lastly, it's my understanding that, at least for a period

[34]

of time, the Wrigley Company filed tax returns in the State of New York; is that right?

A That is correct.

Q Could you briefly describe the circumstances surrounding this filing in the State of New York?

A We had a sales office in New York for many years, and in 1971 it was decided to close the New York sales office and move it to New Jersey at which time we did move the office. Unfortunately, we goofed and made the mistake of filing returns for a period thereafter;

but however, in 1979 we filed for claims for refund for the years 1975 through 1979. And in '84 we had an administrative hearing with the New York State Tax Commission as to the taxability of the Wrigley Company in the State of New York, and the decision was that the Wrigley Company was not subject to taxes in the State of New York, however. It was rewarded to the parent company which was approximately five hundred thousand dollars. However, because of the size of the refund, we are now docketed or pending a hearing before the New York State Tax Commission, and this has been done because of the fact that the amount of money is so large that the audit control division of the finance department of New York wants a hearing on the decision by the referee that we were not subject to tax in the State of New York under

[35]

Public Law 86-272.

Q And that hearing is now pending?

A It is now pending, that is correct.

Q Mr. Bjorndahl, it's my understanding that orders for gum triggered or initiated by the activities of the sales representatives in the State of Wisconsin in the period of time of 1973 through 1978 were submitted to Illinois for acceptance and to be filled there; is that correct?

A That is correct.

Q Does the Wrigley Company have any bank accounts in the State of Wisconsin?

A No, they do not.

Q Does the Wrigley Company own any company trucks which deliver any of its products outside of the State of Illinois?

A We do not own any trucks. All deliveries are made by common carrier.

Q Is true by the State of Wisconsin?

A All over the United States. In most states common carriers just make all our shipments.

Q That was true for the State of Wisconsin in the years 1973 through 1978?

A That is correct.

Q Does the Wrigley Company report and pay unemployment compensation tax in Wisconsin, withholding tax for the

[36]

employees who are residing in the State of Wisconsin?

A Yes, we do.

Q Is the Wrigley Company licensed to do business in the State of Wisconsin?

A No, we are not.

Q To your knowledge, has the Wrigley Company ever filed a lawsuit in the State of Wisconsin?

A Not to my knowledge.

Q Does the Wrigley Company have an office in the State of Wisconsin?

A No, we do not.

Q Does the Wrigley Company have a telephone listing anyplace in the State of Wisconsin?

A No, we do not.

Q Is it customary practice, to your knowledge, for the sales representatives in the State of Wisconsin to carry business cards?

A Yes, it is. On those cards the address is shown as 410 Michigan Avenue, Chicago, Illinois with no reference to any Wisconsin address.

Q So are you saying the information on the cards is limited to the sales representative's name and the Wrigley Chicago office and 410 Michigan Avenue, the Wrigley Chicago office?

A That is to the best of my knowledge.

[37]

Q Does that reflect a company policy?

A Yes, it does.

Q Do Wrigley employees in the State of Wisconsin ever receive a reimbursement for a home office?

A No, they do not.

Q Does the Wrigley Company have any warehouse facility in the State of Wisconsin?

A No, we do not.

Q Does the Wrigley Company have any manufacturing facility in the State of Wisconsin?

A No.

Q Does Wrigley Company have any training facility or training center or other facility in the State of Wisconsin for training purposes?

A No, we do not.

Q Are all prices for Wrigley product determined in the State of Illinois?

A That is correct.

Q Does the Wrigley Company store any inventory other than the supply of samples carried by sales representatives in the State of Wisconsin?

A No.

Q Are any credit approvals or collections made by sales representatives or regional managers in the State of Wisconsin?

[38]

A Not to my knowledge.

Q Mr. Bjorndahl, are you familiar with whether the sales representatives in the State of Wisconsin carry a supply of display fixtures?

A Yes, they do.

Q Are those display fixtures carried on Wrigley's books as inventory or fixed assets?

A No, they are not.

Q And does the title to those display fixtures pass to the retailer upon placement by the sales representatives?

A Yes, they do. They become the property of the retailers.

Q Does the Wrigley Company reimburse its employees in the State of Wisconsin for certain expenses related to sales activities?

A Yes, we do. We do for overnight travel, meals, and lodging and for long distance phone calls, but there is no reimbursement for local calls or personal type expenses.

Q Does the Wrigley Company own automobiles?

A Yes, we do. We own all the automobiles. We lease them. The cars, they are all owned by the company.

Q And does the Wrigley Company reimburse its employees or pay the expenses of automobile maintenance and so forth?

A Yes, we do. That is correct.

Q Mr. Bjorndahl, does the Wrigley Company contract for or

[39]

purchase any advertising in the State of Wisconsin?

A No. All advertising, contracting, and purchasing of services is conducted in Chicago, Illinois. During this term of '73 through '78, it was Arthur Meyerhoff and Company and currently is now B, B, B and Lowe which acquired Meyerhoff and one other firm that is now handling some of the other work.

. . . .

[48]

Q Mr. Bjorndahl, could you briefly outline the history of the -- Let me backtrack a little bit. You mentioned that the Wrigley Company has filed, I believe, with the State of Alabama?

A That is correct.

Q And what were the years that it filed with Alabama?

A 1974 through current.

Q What is the nature of Wrigley Company's business activities in Alabama?

A They are basically the same throughout the country. However, there were instances in Alabama where

[49]

representatives picked up checks for collection matters which the department brought to our attention during that period and was the basis -- one of the bases for their contention that Wrigley was not protected by Public Law 86-272.

. . . .

[52]

Q And is it correct, as counsel has just said, that they were the same in Wisconsin as they were in Alabama with some exception relative to the representatives picking up checks for delinquent accounts?

A Yes, to the best of my knowledge.

Q And can I conclude from what you say that other than that list of states that you mentioned on direct

examination where there were offices, warehouses, manufacturing facilities, or things of that nature, that in all of the other states of the Union, the activities of field men, regional sales managers, and district managers would be the same as in Wisconsin and Alabama?

A To the best of my knowledge, they would be the same.

Q And do all of the incumbents of those positions countrywide do essentially the same thing?

A I would assume so. I don't know specifically if it is a fact, but from my information that I have been told, that is correct.

Q Now, what did the representatives in Alabama do besides picking up money for delinquent accounts?

A Just the same activities they do in the State of Wisconsin, I assume. I really don't know firsthand.

Q And what years were they picking up delinquent accounts?

A I don't recall. It was in the early 60's as I recall.

[53]

Q And how frequently did they pick up delinquent accounts?

A I really don't remember. There was one or two times in the one year that it occurred. However, the reasons we filed with Alabama was because of the economics because of the time period involved, the forty-three years that the company acquiesced, and we decided cost of litigation and administrative costs were so excessive that it was not worthwhile to spend that money to fight the State of Alabama. And as we

receive the actual refund from the State of Illinois, we were not about to go to fight for the State of Alabama.

Q And what are the years when you -- and I say you, the Wrigley Company, -- has filed franchise or income tax returns in the State of North Dakota?

A I recall we did it '70 through '82, but there again the tax was small and the cost of litigation and time and effort exceeded the economics, so the business decision was to go ahead and file. And then subsequently we have not been declared that we were not subject for the State of North Dakota from 1983 forward.

Q And is that determination by North Dakota amongst the papers that you have produced?

A There is a letter that is from the State of North Dakota agreeing to that. At least I thought there was.

Q Did Wrigley's business activities -- Strike that partial

[54]

question. Were Wrigley's business activities in North Dakota during the years 1970 through '82 essentially the same as its activities -- business activities in Wisconsin during years '73 through '78?

A That's correct.

Q What years did Wrigley file franchise or income tax returns in the State of New York?

A Well, it goes back a number of years. We ceased filing by filing claims for refund in the year 1975.

Q When did Wrigley close its sales office in New York?

A 1971.

Q And for years after 1971, what years did Wrigley file returns in New York State?

A '72 through '75 where we goofed, and in 1975 we realized it and filed claims for refunds from the period of time 1975 through '79.

Q Was Wrigley's only business activities in New York State in years '72 through '75 the same as it was in Wisconsin in '73 through '78.

A Yes, I believe so.

. . . .

[55]

Q Did the gum that we have been referring to as samples, was that carried on the books of Wrigley as inventory?

A Yes, it is.

Q And what are the display stands carried as?

A They are not carried on the books of the Wrigley Company at all.

. . . .

[58]

Q Would you state your name for the record and spell your last name, please?

[59]

A Sure. Richard Joseph Radosevic, R-a-d, like in David, o-s, like in same, e, as in Edward, v, as in Victor, i-c.

. . . .

Q And what position did you take with the Wrigley Company

[60]

in May of '78?

A I was a field sales representative.

. . . .

Q Does that mean that you were employed as a sales representative from May of '78 until you became a key account manager in January of '82?

A That's correct.

Q What are the functions of a key sales or key account sales manager? How did you describe that position precisely?

A Key account sales manager.

Q What are the functions of that position?

A Well. My responsibilities right now involve the contact of seven large accounts within the Chicago metropolitan area. These accounts are dictated by our company to be of large volume and of important status to the overall volume of the district in which I reside.

Q So are you saying that a key account is essentially a large account?

A Yes.

Q Would it be fair to say that your functions as a key

[61]

account manager with respect to these large or major accounts is essentially the same as the function of a field sales representative with respect to what are otherwise ordinary accounts?

A Somewhat, yes.

Q In what respect are the positions similar?

A Well, there is the initial account contact with the account for the purpose of improving sales of our products through that account and maintaining the sales that we presently have and those where the estimates are and that's you know the primary function of the job.

Q Okay. Where are you located now as a key account manager?

A I reside in Illinois.

Q Has there ever been a key account manager in the State of Wisconsin?

A Not to my knowledge.

. . . .

[62]

Q You were hired in 1978 as a result of responding to a newspaper ad; is that right?

A I believe so yes,

Q And at some point following your response to the newspaper ad, did you go through an interviewing process?

A Yes, I did.

Q Where did your initial interview take place?

A Big Boy Restaurant.

Q In what city?

A West Allis, Wisconsin.

[63]

Q Did you also go through other interviews before receiving a job offer?

A At least one other interview, yes.

Q Where did that interview occur?

A Another Big Boy.

. . . .

Q When you joined the Wrigley Company in 1978, did Wrigley have any type of formal training program?

A An infield type of program, on-the-job training program.

Q Could you describe that infield program a little bit more specifically?

A Sure. At the time I was hired, the general progression of events that the company followed was to have three or four present sales representatives train the new hired. That training took place either in the new

hire's territory or in the representative doing the training in his territory.

Q And where did your infield orientation take place?

A All four of my trainers trained me in my territory.

. . . .

[64]

Q Mr. Radosevic, did you ever attend a training workshop of any kind in the State of Wisconsin in 1978?

A No, I did not.

Q During the course of 1978, did you have occasion to attend a meeting of sales representatives in the State of Wisconsin?

A At least one time there was a meeting between my regional manager and about two other representatives.

A Is it your recollection at this time that that is all you can recall, just the one meeting that you just mentioned?

A That's all I know for certain, yes.

Q Where was this meeting held, if you recall?

A At a Big Boy Restaurant.

Q What was the purpose of this meeting?

A Well, the meeting that I can remember was simply to go over various company goals and objectives, status of accounts, and, you know, how I was doing as far as

was I feeling comfortable or not in the position that I was expected to do out there.

Q Would it be fair to say that this meeting was primarily informational in nature?

A That's the way I would take it, yes.

Q During the 1978 to 1981 period in which you served as a sales representative in Wisconsin, did Wrigley maintain an office in the State of Wisconsin?

[65]

A No.

Q During the '78 to '81 period in which you served as a representative in Wisconsin, did Wrigley own or rent any real estate in the State of Wisconsin?

A Not that I'm aware of.

Q During that same period of time, did you maintain an office in your home?

A Not really.

Q Why do you say not really?

A Well, if you want to call my kitchen table and the basement -- that was the extent of my office.

Q Did you take a tax deduction for an office?

A No, I did not.

Q Did the Wrigley Company reimburse you for any expenses in connected with that office?

A No.

Q During the period of time in which you served as a sales representative in Wisconsin this 1978 to 1981 period, did Wrigley have a listing in the telephone directory?

A No, they did not.

Q Was it you standard practice during the years of 1978 to 1981 to carry a business card?

A Yes, it was.

Q What information was included on this business card?

A Well, there was my name and, of course, the name of the

[66]

company, William Wrigley Junior Company, and there was an address and a phone number of our Bensonville district office.

Q Where is Bensonville?

A Bensonville, Illinois. It's one of the suburbs of Chicago.

Q Is that the district to which the State of Wisconsin belonged at that time?

A Yes.

Q During 1978 when you served as a sales representative, did you have occasion to receive telephone calls at home from customers?

A No.

Q During the period in which you served as a sales representative in Wisconsin, did you ever at any time have occasion to approve a grant of credit to a customer?

A Definitely not.

Q As a sales representative in Wisconsin, did you have any discretion whatsoever with respect to pricing of Wrigley products?

A No, I did not.

Q Who handled credit inquiries and approval on behalf of the Wrigley Company?

A To my knowledge, it was Chicago. That's where we sent all of our -- You know, any time a company sent in an

[67]

application or a request to go on direct status, the information was always sent to our main office in Chicago, Illinois.

. . . .

Q Did you have any input whatsoever with respect to the granting of approval of credit or the denial of credit?

A No.

Q During 1978 did you rent or lease any real estate for any purpose in connection with your business as a Wrigley sales representative?

A No, I did not.

Q Did you have occasion in 1978 at any time to rent a hotel room in connection with a call away from home?

A No, I did not.

Q Mr. Radosevic, would it be fair to say that the largest or major portion of your job as a sales representative was spent making calls on customers or potential

[68]

customers?

A Yes.

Q What types of accounts or customers did you call on?

A Well, we called on -- I called on both direct accounts and indirect accounts.

Q Could you define the term direct accounts?

A A direct account with our company is any account that is shipped gum from our -- from one of our manufacturing facilities, and the billing goes to that same account.

Q And indirect account?

A An indirect account is any account that would do business with one of those direct accounts; in other words, a retailer primarily.

Q Okay. And when you use the direct account, at that point in time you are essentially talking largely about wholesalers?

A Yes, wholesaler grocery chains, vendors.

Q Mr. Radosevic, when you made a sales call upon a customer or a potential customer, what was your goal or purpose in making a call?

A To increase the sales within that account.

Q How was this goal generally accomplished?

A Well, with a -- It varied a little bit as to whether the account was a direct account or an indirect account. With a direct account, you know, basically you knew what

[69]

kind of brand distribution that you had in that account and you knew their, say, their promotional history. So generally speaking we were trying to formulate a presentation which would get the approval of the account to take on new brand distribution or to take on a promotional offering and to increase their sales.

With an indirect account, you know, basically we would go into an account and conduct an in-store survey of the merchandising situation and see if there was opportunity to expand our package distribution or to get the account to buy in on a promotion during a promotional period so that they could increase their sales from that aspect.

Q And did you then subsequently make a sales presentation based upon the results of the in-store survey that you just described?

A Yes.

Q Did the activities in Wisconsin you might have engaged in in making a sales call include checking

products for outdatedness in exchange of stale product for fresh products?

A Yes, in the retail accounts.

Q When such an exchange was made, did you keep a record of it?

A No.

[70]

Q Do I understand that in making sales calls, you generally carried a supply of samples in your car that you utilized for the exchange of fresh product for stale products?

A Yes, I usually had a small amount on hand.

Q Until 1978, where was this supplier product kept or stored?

A Portion of it was in my garage, and another portion was in my basement.

. . . .

[71]

Q Okay. Back to my original question, would it be possible for you to estimate, either in terms of cases or in terms of dollar value, how much product you continually had on hand at any one time in your garage or home in 1978?

A Well, I would say on an average I might have had about fifteen hundred to eighteen hundred hundred stick boxes on any given month.

Q How many cases would that be?

A I really don't have any idea because again the various packagings, you know, makes it hard to calculate that.

Q Okay. Can you place an approximate dollar value as of 1978 on the quantity of gum that you have just indicated was typical of that period of time?

A I don't know. Maybe a thousand dollars.

Q In addition to the supply of sample gum that you have just described, did you also store or have on hand any other type of goods?

A There were occasions, maybe two, three times a year when

[72]

we would have a promotion, and at those points in time I may have had some promotional product.

Q Did you also have on hand or store display racks or equipment for purposes of displaying the product?

A Many of them.

Q On the average how many display racks or pieces, however you want to describe them, did you have on hand at any one time in 1978?

A I would say anywhere between forty to seventy-five cases.

Q And how many display racks were in a case?

A That also varied. Some of the equipment is what our company terms erector equipment which is equipment that is snapped easily together, and since it's all components, some of the cases had maybe a dozen pieces in them. And then if you get to some of our

actual preformed displays, there was anywhere between one and four displays per case as I remember.

Q These displays were furnished free of charge to accounts?

A Yes, they were.

Q Once these display racks were given to an account, they were owned by the account?

A As far as I was concerned.

. . . .

[73]

Q You were not required to account to the Wrigley Company for these display racks?

A No, I was not.

Q What was the reason or purpose in giving these displays to accounts?

A To increase sales.

Q Is there something unique about Wrigley products or about gum products in general which makes display racks or the display of the product of particular importance?

A Very much so.

Q What's that?

A Well, our product is very much impulse sales oriented to the consumer, and the more often the consumer sees our product, the more likely they are to buy our product. So the more locations that we can get within

a particular outlet, the greater possibility we have of selling that

[74]

product to the customer.

Q Did you find these display racks particularly useful in convincing a small retailer or a restaurant owner who had not been a previous customer of Wrigley to carry the Wrigley product and to purchase the Wrigley product?

A I would say so, yes.

Q Why was that?

A Well, generally it was a very good way for a retailer to gain an extra sale from a customer. If you are talking a grocery store, as the person is checking out, they have an opportunity to see the gum at the register. And you know, chances are pretty good that they will pick up a package as they are checking out with their grocery purchases. Restaurants are pretty much the same thing. If a person just finished a meal and they are up at the register checking out and they see the gum display, see they have forty cents coming back, they may decide to buy a package.

Q As a sales representative in the State of Wisconsin in 1978 from 1978 to 1981, did you have anything at all to do with accounts receivable?

A No.

Q During the 1978 to 1981 period in which you served as a sales representative in Wisconsin, did you ever accept a check from an overdue account?

[75]

A No, I did not.

Q During that period of time, were you ever directed by anyone in management or in a management capacity to accept a check or to request a check from a customer?

A No.

Q Who handled the payment and collection of accounts for the Wrigley Company?

A To my knowledge, the credit office down in Chicago.

Q Well, when the credit department in Chicago was experiencing a problem with collection of an overdue account, were you made aware of the problem?

A Yes, I was.

Q How were you made aware of the problem?

A I would get a copy of a letter that was sent to the account from our credit department.

Q How many such copies of letters did you receive in a year on the average?

A Maybe a half a dozen.

Q What did you do with these copies of collection department letters which you received?

A Disregarded them.

Q Did you as the usual practice toss them out and throw them away?

A Yes, I did.

. . . .

[78]

Q What kind of reports did you make?

A Well, I had a weekly expense account and an itinerary, and I think there was -- I think there was some type of recap that we did. I can't remember if it was on a weekly basis for the, you know, sales calls. Come to think of it, there was a daily report, too.

Q And what was the nature of the daily report?

A It was a computerized system where we inserted the calls that we made for the day and then we, like a college computer test or something, you darkened in a circle for the call number. And I think we kept track of distribution on that form, part of the survey that we conducted when we went into the store.

Q Now, when you say you kept track of distribution, what

[79]

distribution was it that you were keeping track of?

A Well, you know we have X amount of packagings and brands. As we surveyed the store, if they had all of our five stick and seven stick gum, then we would darken in all the appropriate circles for that.

Q So that was in the nature of a survey of your various accounts to indicate whether they carried a particular brand; is that the idea?

A Yes.

Q Who did you send that to, that report?

A I sent copies of it to the company that recapped those sheets, and I kept a copy for my own records and I --

. . . .

[80]

Q Okay. Now, what was the nature of the itinerary report?

A It's about a half of an eight and a half by eleven sheet of paper which asked you to jot down the future weeks, dates, and asks you where -- what city you are going to be in and if you are going to be, you know, in a motel, which motel.

Q Who did you send that to?

A A copy of that went to the district office and to the regional manager and to myself.

Q Would your regional manager have needed to know what your itinerary for the next week was?

A It's always possible.

Q And how frequently did you make that report?

A Once a week.

Q And you mentioned a recap report. Was that a recap that you made?

[81]

A Yes.

Q And who did you send the recap to?

A I really can't remember at this time.

Q And what was the nature of that report?

A Simply to recap my week's activities. I used it to try and help keep myself abreast at a future date, you know, so that the next time that I called on an account, I might know what I did the last time.

. . . .

[85]

Q What did you spend most of your time doing in 1978 when you were a field representative for Wrigley?

A Selling.

. . . .

[86]

Q Now, in 1978, what was a very typical day in terms of your activities as a field representative?

A Well, I'd get up in the morning and put on a suit and go out to the car, check to make sure that I had a supply of displays, small supply of gum that I could use for samples.

Q And how much -- how many displays and how much gum in terms of cases of gum?

A Maybe about -- maybe six cases of gum of various sizes and innerpacks and maybe about thirty to thirty-five assorted pieces of display equipment.

Q Okay. Now, was that gum ever sent to -- Was it always sent to you from Wrigley at your home?

A Always.

Q Was it ever sent to a storage company anywhere in Wisconsin for you to pick up?

A No.

[87]

Q Now, what did you do then after you got your vehicle outfitted?

A Well, then I would proceed to my first sales call. The majority of the time it would be a retail call.

Q And how many retail accounts in 1978 were you assigned to make calls on?

A Oh, there may have been -- There were about seven hundred on my report system, and there were an undetermined couple thousand more not on the report system.

Q And how many direct accounts did you have?

A Oh, somewhere between thirty and fifty maybe.

Q Okay. Well, let's say you hit a retailer as your first. How many calls would you schedule for a morning and how many calls would you schedule for the afternoon?

A Well, it would depend on the particular day, you know, what size accounts I was concentrating on, whether there were resets that had been given to me by a direct account or something that I had planned or, you know, whether it was simply strictly sales calls.

. . . .

Q And then did you give the retailer the full stand full of gum, or did you arrange for him to have to pay for it in

[88]

some way?

A No. Generally speaking, if we were dealing with a small stand, you would take the stand in and then ask him if he would, you know, get an order -- Not ask him. You would get an order from him at that time for the gum to fill that particular stand and that gum you knew, if you were dealing with a small stand like I just indicated, chances were ninety-five percent of those type of accounts were getting that product through a wholesaler. And we would then forward that to the wholesaler or our district office which would forward it to the wholesaler.

Q Well, I take it that if you put in the stand and it was a new stand, you took the gum out of your vehicle and transferred it to him there; is that correct?

A No, I would not say that's correct.

Q Well, did you ever stock new stands from your vehicle?

A I would say possibly on some -- on a few occasions.

Q And how many few occasions were there during your tenure as a field representative in 1978?

A Boy. I would just be guessing. Maybe a dozen times.

Q And just what would -- what all happened in that circumstance that you wound up putting in a new stand and taking the gum out of your vehicle and transferring it to the retailer?

A Well, like I said, primarily I wanted to get a stand in

[89]

and then he wanted to get that order through his wholesaler; but if he couldn't wait, if he said my wholesaler was just in yesterday or something or he was not going to be in for a week, he didn't want a stand sitting around, so we would then fill it and then bill the wholesaler. That paperwork would go into Chicago. They would bill the wholesaler. The wholesaler would then bill that particular account.

Q And what kind of paper did you send to Chicago in that instance? What was it called?

A It was called an agency stock check.

Q Agency stock check. Was that a printed form prepared by Wrigley?

A Yes.

Q And what information was contained on it?

A Simply listed the name of the accounts or, you know, the name of the account you were putting the merchandise into, the name of the account it was being billed through, your name, your territory number, a complete list of all of your items and the hundred stick box equivalent.

Q Well, what would be the largest amount that you would take out of your vehicle and put on a new stand in terms of dollar value that was your experience during this dozen times that you did this?

[90]

A Maybe fifteen or twenty dollars.

. . . .

[92]

Q Now, did you -- What did you do with the gum that was taken away that was stale?

A Destroyed it.

Q And how did you go about destroying the gum?

A I loaded it into my car, and I drove the car to the dump; and I watched a big bulldozer push dirt over it.

Q Is that your standard procedure?

A It was for me.

Q Now, did you ever have occasion to completely stock a retailer's display when all of the gum was stale?

A No.

[93]

Q Are you responsible for all the fresh gum that Wrigley sends you?

A Yes, I believe so.

. . . .

Q Well, when you first received a supply when you first took over the job and they told you what you were supposed to do and they gave you the gum, did they give you any kind of report or any summary or something that indicated that you were responsible for the gum that they had given you and you had to account for it periodically?

A Well, we use the agency stock transactions, the stock checks.

Q Well, how did you use the agency stock check?

A Well, when we got gum from the company, I would fill out how much gum I got from the company and sent the copy to the company.

Q And would you also fill out an agency stock check when you merely replaced some of it on the retailer's shelf at no charge to the retailer?

A No.

Q Well, how did you -- Weren't you getting red of most of this gum by giving it away to retailers?

A Well, I'm not -- I'm not clear what you mean by that.

Q Well --

[94]

A I gave some as samples.

Q Um-hum.

A But you said most. No, I did not give most away.

Q Well, okay. You got a supply of gum, and you always had a certain amount on hand; is that true?

A Um-hum.

Q You said you indicated about a thousand dollars worth?

A (Witness nods head up and down).

Q And part of your duties, as I understand it, was to go around and make sure that the gum that was being displayed was fresh; is that part of your duties?

A That's correct.

Q And when you found that some of the gum was stale, what did you do?

A Well, if XYZ store had five boxes of stale gum, I would take five boxes of stale gum out and I would give them five boxes of fresh gum.

Q So in that instance you were giving the gum away?

A No, I don't think so. I think I was exchanging it.

Q Oh, I see. All right. Perhaps some terminology, but you were exchanging the gum?

A Right.

Q And that's how I take it that you had occasion to transfer to the retailer's most of the gum that Wrigley sent you?

[95]

A That would be correct.

. . . .

Q Well, that's what I thought you said, so when you made out the agency stock check that went to your home office and in turn they billed the wholesaler for some gum, you billed the retailer, right?

A That would be correct.

Q And in that instance was the gum that the retailer received gum that he paid for?

A Yes, he would pay his wholesaler.

[96]

Q The wholesaler would pass it on to Wrigley?

A That would be correct.

. . . .

Q Mr. Radosevic, you have testified, I believe, that with respect to a survey or daily report that copies of that report were sent to one of the managerial offices, you retained one, and then another copy of that report went to another company; is that correct?

A Yes.

Q You don't know which company that was?

A I cannot recall the name of it, no.

Q Can you state with any certainty whether the company to whom or to which you sent that report was a company within the State of Wisconsin or outside the State of Wisconsin?

A It was definitely outside the State of Wisconsin.

[97]

Q Going book to the period of 1978 when you served as a sales representative in the State of Wisconsin, on the average what percentage of your working time did you spend making sales calls out in the field and preparing for sales calls?

A I would say about eighty-five percent of my time.

Q What percentage of your time was devoted to completion of the various reports that you have described today?

A Oh, maybe five percent.

. . . .

Q Would it be fair to say that that occurred on the average

[98]

of once a month?

A I would think that's a pretty fair lead in, yes.

Q Now, when you testified to putting in a display stand and stocking it, I believe you indicated that something was done on a daily basis. Did you, by your testimony, did you mean that placement of the display stand or giving of the display stand to the establishment occurred on a daily basis?

A That's correct.

Q Did you stock that display stand or utilize stock from your car in filling that display stand on a daily basis?

A No, I did not.

Q Where did the stock which was ultimately utilized to fill that display stand come from?

A The majority of the time it came from the store. In fact, you know, on many times when we placed a display, that's how we preferred to fill that display. If a store had, you know, excess stock of, you know, some

of our other packet sizes, then I could work out a swap similar to if they had unsaleable gum where I might take their overage in some packages and give them the pack sizes that went into that particular display; but the majority of the time the stock came from the store.

Q And was it your general practice at that time in 1978 to encourage the store and the store personnel to do the

[99]

actual stocking of the display?

A Whenever possible. I felt my job was sales and not stocking.

Q Was it also your practice in 1978 as a sales representative to encourage the account that you were doing business with to order the product through the normal channels; that is, the wholesaler or the direct account or that store account that store dealt with?

A Whenever and wherever possible.

Q Mr. Radosevic, you have also described a report which you have termed an agency stock check. Is that agency stock check in any sense an invoice?

A No. There is no mention of any kind of pricing on it.

Q Is that agency stock check in fact the way in which you, as a sales representative, accounted internally for the quantity of product which you kept on hand?

A Yes, that and, you know, so that a retailer would have a receipt.

Q When the stale product was picked up and subsequently destroyed, was that fact also noted on an agency stock check?

A Yes, it was. Anytime that, you know, the amount of unsaleable was significant in a store, it might just -- Well, if it was very significant, you would box it up and send it back to Chicago. If it was smaller quantity and

[100]

I did not have quantity to exchange for them, I might just take it out of the store and give them a receipt that I had picked it up. And then, you know, it would ultimately be destroyed. He would receive credit. I would sent it into Chicago, and the store would receive credit through its, you know, primary distributor.

Q When large quantities were found to be stale and you shipped them back to Chicago, by that you mean that a common carrier shipped it back to Chicago?

A Oh, yes, definitely.

. . . .

Q What do you do the other ten percent of your time? You mentioned eighty-five percent making sales calls, five percent on reports. Anything else you can think of?

A Well, you know, I understood her question to be, you know, weekly type reports. The other ten percent would have focused on just general correspondence.

PROCEEDINGS BEFORE THE WISCONSIN
TAX APPEALS COMMISSION

TRANSCRIPT OF 8-27-85

[2]

Q Will you state your name for the record and spell your last name?

A John Kroyer, K-r-o-y-e-r.

. . . .

[3]

Q And your present position then is district manager?

A Yes.

[4]

Q Headquartered in?

A Southfield, Michigan, suburb of Detroit.

Q Then to summarize you worked for the Wrigley Company initially in the capacity of field representative and that would apply to your experience in California and in St. Louis. In 1972 you were appointed regional manager and moved to Milwaukee and you remained in Milwaukee until 1976 when you were appointed district manager, and at that point your district manager position was with respect to the district which includes Michigan?

A Right.

. . . .

Q During the 1973 to 1976 period when you served as regional manager in Wisconsin, how many districts were there?

A I believe at that time the company had eight -- seven or eight. I'm not exactly sure.

Q And Wisconsin is generally part of which district?

A It filed as part of the Midwestern district base out of Chicago, Illinois.

Q And at that point in time, what other states were

[5]

included in the Midwestern district?

A Okay. We had, of course, the State of Illinois. We had the State of Wisconsin, a small portion of the Upper Peninsula of Michigan, the State of Minnesota, part of Iowa, North and South Dakota. I think that's basically accurate.

Q And the Wisconsin region in terms was composed of how many sales territories during the 1973 to 1976 period?

A It started with four, and it grew to five, the fifth one being consummated approximately January of '76 just prior to my going to Detroit, which was an out of state territory headquartered in Rockford, Illinois.

Q Each of those territories was worked by a sales representative?

A Correct.

Q Were all of the -- Were the four sales representatives who worked in that region during the '73 to '76 period working exclusively in Wisconsin?

A Yes. Four of them were, correct, two in Milwaukee. Well, no, only two of them were exclusively in Wisconsin. The two in Milwaukee were. I had Roger Cichocki in Green Bay. He worked the Upper Peninsula of Michigan, those three counties, Schoolcraft, -- I forget the other two. Then we had Rich Kuckkahn and Fred Ramage before that, who not only worked in Wisconsin, but also in Illinois

[6]

over to DuBuque, Iowa.

Q Could you estimate what portion of Rich Kuckkahn's and formally Fred Ramage's time would have been spent outside of the State of Wisconsin on the average during that period of time?

A I'd say in the range probably a third of his time.

Q And with respect to the sales representative who was working out of Green Bay, approximately what portion of his time during those three -- that three year period was spent outside the State of Wisconsin?

A Not nearly as much. Probably in the neighborhood of ten to fifteen percent.

Q Now, during that particular period of time, in addition to the sales representatives that you have just identified the territories that you have just identified, were there any other representatives working any portion of the State of Wisconsin who resided outside of the State of Wisconsin?

A Yes. At that time the Eau Claire and La Crosse areas were not part of the Milwaukee region. They were part of the Minneapolis region, and a representative of Minnesota came and worked that portion of the Minnesota region.

Q Mr. Kroyer, could you briefly describe the functions of a regional manager in the State of Wisconsin during the period of 1973 to 1976 when you served as regional

[7]

manager?

A The primary intent was to increase volume, increase sales, increase your distribution, and improve your merchandising.

Q During that period of time, there was no key account manager in the State of Wisconsin?

A No, there were no key account managers at that time.

Q Would it be fair to say that the regional manager in the State of Wisconsin during the '73 through '76 period were directly responsible for those key or manager accounts?

A Yes, directly responsible.

Q During that period of time, would it also be fair to say that the functions typically performed by a key account manager were generally performed by the regional manager?

A Along with certain representatives who had that certain responsibility, yes.

Q Approximately what percentage of your time as regional manager during the period of 1973 to 1976 did you devote to sales activities in connection with the accounts for which you had responsibilities?

A I'd say in the neighborhood of eighty to eighty-five percent of my time was spent in sales activities, either by myself, or working with the various field representatives within the region.

Q Just by way of an example, could you identify some of the

[8]

accounts which you would classify as typical accounts for which you were directly responsible during this period of time?

A Well, I had Kohl's supermarket. I had Sentry foods, and I took the major responsibility for our vending trade classification. And I was seeking out new business like with Farm and Fleet and Fleet and Farm, so I basically had that responsibility.

. . . .

[9]

Q Does that mean that you spent approximately fifteen percent, perhaps twenty percent of your time in connection with other types of responsibilities?

A Yes, mainly administrative reports, salary reviews, just the normal administrative activity.

Q During the 1973 to 1976 period in the State of Wisconsin, what processes, if any, were utilized with respect to training new hires in the position of field representatives?

A Well, at that time the company really did not have a formal training program. We did not have a training center like we do now, so the basic responsibility to see that a new hire was properly trained was in the hands of the regional manager. And I would set up the training schedule and that generally took approximately four weeks. What I liked to do with a new hire during those four weeks is have him work with just our top people so he got a good background and good understanding of the position, but there was no formal training program as such. It was determined by the regional manager at that time.

Q And all of this work with the top people was work that occurred out in the field?

[10]

A In the field.

Q And by in the field, you mean within the territory that the particular new hire was working?

A Wherever possible, correct.

Q Where he was going to be working?

A Yes.

Q So in fact during that period of time in which the new hire was being trained, was that territory also being worked?

A Yes.

Q In the normal sense of the term worked from the standpoint of what sales representatives were doing?

A Correct.

Q So the training and working went together?

A On the job training.

Q It all went at the same time? The training was not separated from the normal field responsibilities?

A No. All the training was done in the field.

Q During the '73 to '76 period in which you served as regional manager in Wisconsin, did Wrigley have occasion to hire new sales representatives?

A The only replacement that I had during that time was Fred in Madison, and then I hired Rich.

Q You are saying you hired Rich to replace Fred?

A Right.

[11]

Q Fred was terminated?

A Right. And we also had a retirement. Roger Abraham retired, and we replaced him with Greg Gabrys; and I believe just before I left Roger Cichocki resigned. And I did the preliminary interviewing for his replacement. Then Gary Hecht, when he came up to take my spot, he made the final decision on who he wanted, but I did the preliminary interviewing.

Q When a vacancy arose, was that fact typically communicated to the district manager in Chicago?

A Correct.

Q And would your district manager in Chicago make the decision as to whether the vacancy would be filled?

A Yes. I would recommend to the district manager, and he would take it up with Chicago; and the position would either be approved to be refilled or denied. I did not have the final say.

Q Once a decision had been made with respect to filling in the vacancy, you generally handled the process of locating an applicant and interviewing him?

A But that was my responsibility, correct.

Q How did you go about finding an applicant to interview?

A Well, hopefully we knew of someone who was looking for a job that was qualified. I personally did not like to put an ad in the paper, so I went through employment

[12]

agencies, both independent and I went through the Wisconsin resources.

. . . .

Q How did you and Richard Kuckkahn get together for purposes of an interview?

A I left word with three or four employment agencies around town as well as the state, and I gave them basically the criteria that I felt basically was required in a sales representative. And they would screen applicants, and when he had a number of them, I would go there.

Q So your initial interview of Richard Kuckkahn occurred in the office?

A I think it was Snelling and Snelling.

Q Is that here in Madison?

A Yes.

Q Did you interview Mr. Kuckkahn at any places other than the employment agency?

A Rennebohm's Drug and Restaurant.

Q Did you ever utilize a motel room for purposes of

[13]

interviewing an applicant for a job?

A I don't know. I always used the facilities provided by the employment agency or the state.

Q And after the interviewing process, if you found a applicant that you liked, did you then relay that information to the district manager in Chicago?

A Correct.

Q Who made the final decision with respect to hiring an applicant?

A Well, I made the final selection, and I made my recommendation to the district manager; and he either approved it or disapproved it.

Q When you served as regional manager in Wisconsin from the 1973 to 1976 period, did you maintain an office in your home?

A Yes.

Q Did the Wrigley Company provide you with any reimbursement in connection with the office?

A No, they did not.

Q During the '73 to '76 period when you were regional manager in the State of Wisconsin, was it your practice to conduct meetings within your sales force?

A Occasionally. I was not real big on meetings.

Q Now, during the period in which you served as regional manager in Wisconsin, did you hold a meeting of your

[14]

entire sales force?

A You want to know how many times during that three year interim?

Q During the three year interim or the entire year?

A It probably averaged one a year when we got everybody together.

Q Where were those once a year meetings generally held?

A At my home.

Q Did you ever conduct a meeting of that type in a motel-hotel situation?

A I think we had one meeting. In fact I'm positive we had one meeting at the Marriott. I think it was in Brookfield, but it was a combined meeting with my region and the Minneapolis region along with the district manager in conjunction with a package change at that time. We were predominantly a five stick package, and we converted to a seven stick package so

it was a rather extensive meeting. The package change was a very significant development.

Q Would you describe the content or discussions at the yearly meetings that you have just mentioned?

A Well, they were mainly sales strategy meetings, how we could get additional volume, how we could improve content merchandising. They were all related to sales, how we could get greater sales.

[15]

Q Would you characterize these meetings as training sessions?

A No, they were sales meetings.

. . . .

Q Did you on behalf of the Wrigley Company conduct any training work shops or meetings in the State of Wisconsin during the 1973 to 1976 period?

A No.

. . . .

[16]

Q How would you describe the functions of sales representatives in the State of Wisconsin during the 1973 to 1976 period?

A As I perceive it, their main function was sales increase, distribution, improve merchandising, and improve customer relations in the normal administrative work.

Q What does the term merchandising mean to you?

A It means to me they have the best possible display at the retail outlet that you can, the best location, adequate inventory in your fair share of that display space based on your market share.

Q Were these functions of selling, distribution, merchandising separate and distinct from one another?

A They were all intertwined.

Q Could you explain what you mean by that?

[17]

A We have -- Wrigley gum is a unique product. It's an impulse item. It's not a planned purchase where the housewife has on her list to by a loaf of bread, a quart of ice cream, and toilet paper. We are visible to the consumer. We don't sell product. You can take the same display and move it from a good location to a poor location, and it just collects dust. So sales and merchandise goes hand in hand due to the nature of our product. You have to have it visible to the consumer. They will not ask for it.

Q Mr. Kroyer, are you familiar with any studies which examine the impulse nature of a purchase of gum?

A DuPont did a study in the early 70's where it showed that Wrigley chewing gum was approximately a ninety-four or ninety-five percent impulse item; in other words, it's not a planned purchase.

Q Now, you have mentioned three categories of sales related activities which you identified as being interrelated and going in hand in hand. We have had some testimony in these proceedings with respect to the exchange of fresh product for stale product. Where would you place the sales representative's exchange of

fresh for stale products within your scheme of the functions of a sales representative?

A Oh, it's an important factor because it's one thing

[18]

that's of utmost importance that we have fresh product available to the consumer at all times. Nobody likes to purchase a stale pack of gum, a stale candy bar, and unless you keep fresh product available at all times to the consumer, eventually it's going to affect your sales.

Q Would you place it within the selling function as opposed to the distribution function?

A It's definitely a selling function. You want to ensure that the consumer continues to buy your product.

Q Again, going back to the description of the functions of the sales representative which you have just provided to us, your talk of selling distribution and merchandising as you have defined the term, drawing on your experience as a regional manager in the State of Wisconsin during the 1973 to 1976 period, can you recall any specific occasions where your efforts, for example, in the distribution area ultimately resulted in a substantial number of orders being placed?

A I think probably the prime example would be Kohl's supermarkets. I believe when I came to Milwaukee, they had approximately a forty-five percent share of the market and at that time only had one package size in Kohl's supermarkets. We had six pack at the checkout, and for the type of outlet and the volume they do, that was just not sufficient.

[19]

So we were able to convince them to take on our plenty pack size, which is the seventeen stick package, to the checkout and take on our ten pack packaging and place it in the body of the store in the candy gondola. And just to show you the volume, we went probably from zero packs of plenty pack being sold in Kohl's a week, to somewhere between eight and twelve thousand packages being sold a week, and on the ten pack we went from no ten pack sales in Kohl's to probably fifteen hundred to two thousand bags a week.

Q And those sales ultimately translated into orders being placed with the Wrigley Company for that quantity of gum?

A Correct. And we also spent considerable time with accounts like Farm and Fleet and Fleet and Farm who, up until they took on Wrigley chewing gum, did not handle confection items. And I believe they now do a quarter million dollars a year in chewing gum, and when he first started knocking on the door, they didn't even carry Wrigley chewing gum products.

Q As a result of your experience in working for the Wrigley Company in a number of capacities, it's over a period of I believe approximately twenty-three years, have you become familiar with normal selling practices and procedures utilized by manufacturers of gum products?

A Yes, I believe I did.

[20]

Q Are Wrigley's procedures with respect to selling and distribution activities and so forth typical of the selling procedures utilized by other manufacturers of gum?

A Correct.

Q Mr. Kroyer, we have had testimony in this proceeding with respect to a supply of sample product which is carried by the sales representatives in their car and stored in their home or in their garages. Are you familiar with the fact that sales representatives typically had on hand a supply of gum product?

A Yes.

Q And I believe it would also be accurate to say that we have had testimony in these proceedings about that supply of gum being used for purposes of furnishing samples for purposes of replacement of gum and in some instances for purposes of what's been termed a display in stock situation?

A Correct.

Q Could you rank those functions of the gum supply as we have identified it in terms of significance or importance to how much -- you know, which of those matters, sample replacement, the display, and stock, was represented as the greatest use of this?

A Oh, by far and away the greatest usage is exchange of

[21]

product probably in the ranks of eight-five, eighty percent that the representative has on hand for the use of outdated product or for the balance of stock within a retail outlet.

Q And what portion is utilized as samples?

A I'd say eight to ten percent, somewhere in that nature.

Q And approximately what portion then would be utilized in the display and stock situation?

A Probably in the neighborhood of five percent of the total stock.

Q Now, directing your attention to the 1973 to 1976 period when you served as regional manager in the State of Wisconsin, could you estimate for me the approximate dollar value of the supply of product typically kept on hand?

A Give me a second to try to remember how much our product cost then. Probably somewhere in the neighborhood of one thousand bucks.

Q Now, that supply of product that we are talking about valued at approximately a thousand dollars, did that consist only of new fresh product?

A No. It was a total of new plus the outdated.

Q About what portion of that product typically represented outdated product that had been changed by the representative?

[22]

A Oh, that would vary from time to time, but probably in most instances an area of thirty-five to forty percent. At that time we had to case it up and return it by common carrier to our Chicago factory. We did not dispose of it locally at that time. It was all cased up and returned to Chicago.

Q Mr. Kroyer, can you identify Reynolds Transfer and Storage?

A Yes. In the summer of 1973, I can't remember the exact date, July or so, unfortunately, I had a

termination and I was stuck with the company car, agency stock, and all company properties. So I looked around for a place to store those materials locally until I could find a replacement for Fred. And it took three or four months to find a replacement for Fred, so in the interim I stored all the materials at Reynolds storage. He had the facilities and his rental was reasonable, so I, on a month to month basis, rented out space and I paid Reynolds and placed a charge on my expense account.

Then when we hired Rich. He lived in an apartment house, and he had no means to store the chewing gum and our displays. So I got permission from the company to have him store it locally until he bought a home, and I think he continued on with Reynolds on a month-to-month basis.

[23]

Q Was the company policy at that point in time, '73 to '76, to the effect that the sales representatives would store the display stands and gum in their homes or garages?

A Correct. That was the common practice but in Rich's case, living in an apartment, he didn't have the means.

Q So this was an exception to the rule?

A Yes.

Q Made on the basis of the specific facts of the situation?

A Correct.

. . . .

[24]

Q During the 1973 to 1976 period in which you served as regional manager in Wisconsin, who was your district manager?

A Gerry Marx.

Q Mr. Marx resides in Illinois and was headquartered in Chicago?

A Correct.

Q Could you briefly describe Mr. Marx's functions as a district manager?

A Well, at that time the district manager, as it is today, is ultimately responsible for all activities within a Wrigley sales district. And Gerry oversaw the four or five regions at that time that were in the Midwestern sales district. He was accountable for all activities, sales volume, account problems, whatever it might be.

Q Did Mr. Marx at that time also have direct contact with accounts?

A Yes. Gerry was very good about getting out and being with the accounts, offering any assistance he could.

Q During the 1973 to 1976 period, did Mr. Marx have occasion to come to Wisconsin in connection with his duties as a district manager?

[25]

A Yes, he did.

Q Approximately how many working days in the course of a year during that '73 to '76 period did Mr. Marx spend in the State of Wisconsin?

A I'd say during a given year Gerry was probably in Wisconsin working usually five, six days a year.

Q And were some of those days or parts of those days spent out in the field?

A All of them were. Like I said, Gerry was very account minded. He either spent time with me, or we would actually work with field representatives for a day.

Q Did Mr. Marx ever have occasion to attend a sales meeting, one of your annual sales meeting?

A The only meeting that Gerry ever attended was the one that I alluded to we had in Brookfield which was a combined meeting with my region and Minneapolis region. Other than that he never attended a sales meeting.

Q During the 1973 to 1976 period in which you served as sales representative in the State of Wisconsin, did the Wrigley Company maintain an office in the State of Wisconsin?

A No.

Q And during that same period of time, did the Wrigley Company own or rent any real estate in the State of Wisconsin?

[26]

. . . .

Q And during that period of time when you were regional manager in the State of Wisconsin, did you, as regional manager, or any of your sales representatives have any discretion with respect to pricing of products?

A None whatsoever. All pricing is determined by our corporate headquarters in Chicago.

Q Who handled credit inquiries and approvals on behalf of the Wrigley Company?

A The credit department.

Q Located where?

A Chicago, Illinois.

Q You never at any time had anything to do with the extension, denial, or granting of credit to any customer in the State of Wisconsin while you were regional manager?

A No.

Q Mr. Kroyer, going back over the twenty-three years in which you have served in a number of capacities for the Wrigley Company, did you ever have occasion to pick up a check from a customer?

A I did pick up a check one time years and years ago. The

[27]

account was so embarrassed the invoice hadn't been paid, he insisted I take the check. That's the only time I ever actually received payment.

Q And that did not occur in the State of Wisconsin?

A No, no.

Q California?

A Yes, little town called Manteca, California.

. . . .

Mr. Kroyer, while Mr. Greenwald is getting ready to ask, I'll insert one question. Suppose X opened a new supermarket and wanted to carry gum, how would he contact Wrigley to get started without a telephone listing, probably without intimate knowledge of the corporate headquarters?

THE WITNESS: Well, it can happen one of two ways. You can either place an account on direct basis if they fit the criteria, and if that's the case, you have them fill out an application and a financial statement which is submitted to Chicago for approval or disapproval.

COMMISSIONER SMITH: All right. But this, as I understand the system, would necessarily require contact with a sales represent?

[28]

THE WITNESS: Correct.

COMMISSIONER SMITH: What happens when X wants to start but he doesn't know the sales rep, hasn't ever had any contact with the sales rep?

THE WITNESS: Generally if it's an independent account, we get word through one of our wholesalers. The contact will contact a candy jobber inquiring to see a Wrigley presentation like a chewing gum display. That's generally how we come across, and in a lot of instances if it's a brand new account, our representatives, as they work in the territory, spot the new building under construction. And when it gets close to opening, they contact us themselves.

. . . .

Q Mr. Kroyer, you mentioned that you had an office in your home during the years 1973 through 1976; is that correct?

A Yes, sir.

Q And could you describe what that office consisted of?

A Okay. I had a pretty good sized basement so I took a far corner, and I had a good sized desk there. I had my files and everything pertaining to the job. I had a

[29]

phone down there. It was just my in-home office.

Q In the office did you have any equipment that was furnished you by Wrigley?

A I had one company issued file cabinet.

Q And was that the extent of your office?

A Yes.

Q Did you have occasion to store any product in your home for any reason?

A Yes, I did.

Q And what was the nature of that or extent of it?

A I just kept small amounts of gum on hand for sampling purposes when you make a retail call or headquarter call or presentation.

Q How about display stands?

A A few.

Q And how about promotional literature?

A During the promotional period, I did keep some promotional materials on hand.

Q Did you keep an amount that was as much as a field man would?

A Oh, not even close.

Q How much promotional literature in terms of dollar's worth would a field man have as a normal supply of promotional literature?

A You are talking about a point of sale material, cardboard

[30]

signs, that type of material?

Q I'm sorry. I didn't catch the first word.

A I don't quite get your question. What they had on hand majority of time was point of sale materials, cardboard signs, pricing signs.

Q Well, aside from that was there anything they used in connection with doing their jobs other than the point of sale material, signs, and things like that? Was there anything in the nature of literature?

A We would -- They would have sales bulletins and literature, bulletins, brochures he would leave with the accounts.

Q And what would be the value of that kind of material the field men might have?

A Couple hundred bucks maybe. That's just a guess. All the materials are supplied from the corporate office.

Q Now, what was the purpose of the office that you maintained in your home?

A So I could coordinate the sales activities and keep my thumb on top of all regional activities.

Q Do you have -- Did you also prepare your reports to your supervisor at that office?

A Yes. I had all the account files there and all the representative files, all the personnel files that pertained to them.

Q And what percentage of your duties might have been preparing reports for your supervisor?

A I would say overall I probably spent about fifteen percent of my time on administrative duties; that being reports, salary descriptions, whatever it might be.

Q And were you a resident of Wisconsin at that time?

A Yes, I lived in West Bend.

Q And did you take an income tax deduction for your office in your home?

A Yes, I did.

Q Now, if I understand correctly, you weren't reimbursed any money by Wrigley in connection with that expense that you incurred?

A No. The only thing I claimed on my income tax was square footage because the company reimbursed me for telephone calls and that.

. . . .

[32]

Q And am I correct in my understanding that after the time Mr. Kuckkahn was hired and up until the time you left, his stock of gums and displays were sent by Wrigley to Reynolds storage for him?

A I'm trying to -- Yes, I'm sure they were sent there.

Q And then I take it that if he was going out on the road and planning his calls and in order to get this gum into his reach that he would just make a stop at Reynolds and draw down whatever he need for his activity and then go about his activity?

A Yes. I think he would generally pick it up maybe even on the way home so he would be prepared the next morning.

Q And I believe you testified that it was in '74 that Mr. Kuckkahn was hired?

A I think we hired Rich in '73 if I'm not mistaken.

Q Oh, I'm sorry.

A I think sometime in the fall, late September, early October. I don't know the exact date.

Q What did you do in connection with obtaining company approval of having Mr. Kuckkahn have his gum and displays stored at Reynolds? Who did you contact?

A I'm just going off faint memory, but I believe I had to contact my district manager Gerry Marx.

Q And I take it you told him the situation, and then he said, "Okay, Rich can store the stuff at Reynolds"?

A I think, yes, that's probably how it happened.

Q And how was Reynolds paid for the -- for whatever they charged?

A I think during the interim where we didn't have Rich, I paid Reynolds once a month. They gave me a receipt, and I placed it on my expense account.

Q Did you then take care of it in that manner through until the time you left?

A No. Once Rich was aboard, he took it over. I just it did it on an interim basis.

Q I see. So Rich then put whatever Reynolds charged on his expense account. Did Rich's expense account then go to you for approval?

A A copy of it did, but our expense accounts all go to Chicago.

. . . .

[34]

Q Did you ever get involved in your tour of duty in 1973 through 1976 relative to any credit problems?

A For the most part no. Occasionally, yes. Generally by the time we received a copy of any correspondence regarding credit sent to the account, it was already taken care of in past history. I never interceded or took any effect until a letter got rather nasty with a real good account. Then I would intercede to the point where I would see if I couldn't get the account in Chicago together to find out what the problem might be, but I never in fact tried to collect. I tried to find out what the problem might be, and if it was a mistake on the Wrigley Company's part, we

straightened it out or if the account had a problem or if the account was having some temporary financial difficulties, I would take it to our credit department on behalf of the account and see if we couldn't get some shipments made. And then when the account was fully recovered, you had a loyal Wrigley customer where if you don't try to see a good account

[35]

through a little bit of difficulty and he does recover, you haven't helped him out. Then you have an adverse account.

Q Well, during that three year period, and what I'm talking about would be 1973, '74, and '75, that would be the major portion of the time that you were the regional manager, in what manner during that entire period would you intercede in a credit related problem? What would you do if you interceded?

. . . .

A I basically did what I just illustrated. I tried to find out what the problem might be and get the account and our credit department communicating to see if we couldn't solve the problem so we still had a good customer.

Q Okay.

[36]

A My job is to sell it, not collect it.

Q It sounds like you were kind of a mediator between the account and the credit problem that was creating some static; is that the idea?

A That's it.

Q And that's the nature of any intercession on your part?

A Yes. I basically sell it, and the credit department collects for it.

Q And during that three year period, how frequently would that occur?

A Probably a couple, three times a year. I mean it was not a frequent occasion.

Q Well, would that be a time consuming activity or very -- just kind of a day? Would it take you a day?

A It was not that time consuming, no.

. . . .

[42]

Q In 1973, if I recall your testimony, you indicated -- Or let me strike that. In 1973 did you supervise four sales representatives in your region?

A Yes.

Q Was the same true up until the time you left your position in May of 1976 and went onto your district sales?

A March of '76.

Q I'm sorry. Is it March of '76 that you went? Did you always have four sales representatives to supervise throughout the time you had the position from, let's say, January 1, 1973 through March 1976?

A What we did is we added a territory and a representative in Rockford, Illinois.

A When did you add that territory?

A It was either late '75 or early '76 just prior to my going to Detroit, and then during that period of time, we had one additional hire in Milwaukee because we were having a pending retirement.

[43]

Q Well, in other words, the Milwaukee hire was in anticipation of a vacancy?

A Correct.

Q So I take it that it was anticipated that at about that time the staffing would be for five sales representatives within the Milwaukee region?

A Correct.

. . . .

[44]

Q I think you indicated that the regional staff was fairly stable during the period that you were in Wisconsin and that you only had occasion to hire one person; is that correct?

A We only had one termination.

Q During the three years approximately?

A Yes, one termination.

Q Now, what was the nature of that termination? Was the person discharged?

A Yes.

Q What was the name of the individual who was discharged?

A Fred Ramage.

Q And how do you spell Ramage?

A I think it's Ramage. I believe that's correct.

Q And did you have authority to discharge a field representative?

A Well, the final say was with the district manager, but this was a rather spontaneous on the spot dismissal; but

[45]

the ultimate decision relied with the district manager.

Q What role did you play in Mr. Ramage's termination in terms of what did you do?

A I terminated him.

Q And what information did you h ave at the time you took that action?

A He was not working.

Q So what was it related to?

A Job performance or lack of, and the district manager was aware of the problem.

Q Did you regularly make performance evaluations regarding Mr. Ramage?

A Yes.

Q And how frequently were those made at that time?

A Let's say on the average of once a year a formal review.

Q When was Mr. Ramage terminated?

A It was probably June or July, somewhere in there, of 1973.

. . . .

[46]

Q And did you discuss the contemplated action with your district manager?

A Correct. I discussed it with Fred and gave him every opportunity to change his ways.

Q And what conclusion did you then reach as to whether Mr. Ramage should be terminated or not?

A I don't quite get that.

Q I take it you reached a conclusion at some point in your own mind that it would be better for the company if he

[47]

didn't work for Wrigley?

A Correct.

Q And did you then tell your supervisor what your recommendation was?

A I told him in advance if I found what I thought I'd find, I was going to dismiss Fred, and he agreed.

Q And that was Mr. Marx that you did recommend this to?

A Correct.

. . . .

[48]

Q And did Mr. Marx give the final -- Well, let me put it

[49]

this way. Did you decide that Mr. Kuckkahn was the best candidate for the position?

A Yes, I did.

Q And did you make a recommendation to Mr. Marx that Mr. Kuckkahn be offered the job?

A Yes, I did. Then I had to explain his background and everything else.

Q Did you have any leeway in terms of the salary you could offer Mr. Kuckkahn as a starting salary?

A None whatsoever. That's all predicated and determined in Chicago. Our starting salary for field representative is the same throughout the country.

. . . .

[50]

Q The Exhibit 7 that we have had made some reference to here, on the first page in the paragraph that's at the bottom of the page that starts the management of the region's field force and so forth, on the third line

[51]

there is a reference to the regional sales manager actively participating with the district manager in the orientation of the region's field representatives. What does that word orientation mean?

A It means on the job training. You go through all the particulars of the job duties.

Q Did you engage in that kind of orientation with Mr. Kuckkahn?

A Yes, I did.

Q How much time was involved in that on your part? How much of your time did it take to orient Mr. Kuckkahn in his position?

A Well, the majority of it was done initially by the trainers.

Q And who are the trainers?

A I think probably Ron and Roger Cichocki.

. . . .

[52]

Q Now, how did the -- Was Ron and Roger -- were they sales representatives?

A Yes. One lived in -- Ron lived in Wauwautosa, and Roger lived in Green Bay.

Q Now, did the trainers get the training assignment from you?

A Basically, yes. I laid out what I wanted accomplished week by week by week.

A And which territory did the training take place?

A I think in Rich's case it took place within his retail territory or a soon to be retail territory.

Q Now, within the Milwaukee region there were four areas,geographic areas, that were assigned to sales representatives; is that correct?

A Correct.

Q What are those geographic areas called?

A Just retail territories.

Q So in connection with Mr. Kuckkahn assuming his duties, I take it that you directed these other gentlemen to leave their own home retail areas and ride with Mr. Kuckkahn in his area?

A Correct.

[53]

Q There is a reference to field training immediately after the reference to orientation. Is that something different than orientation?

A No, they are both the same thing. They are combination of the two. The orientation and the field training are all done at one time.

. . . .

Q And in performing your duties as Milwaukee regional sales manager, did you assign yourself a territory, a retail territory?

A No, I did not. I had the ultimate responsibility to the entire region.

Q How many direct accounts did you see yourself during that period just on an average?

A Well, the major ones were Kohl's and Sentry, and like I

[54]

said earlier, I took responsibilities for the majority of the vending trade class. So I could have called on twenty or thirty vendors, the large important vendors to the region.

. . . .

Q What would be an average assignment of a field representative in terms of the number of direct accounts assigned?

A It could range anywhere from four to six hundred and fifty.

Q Is that four hundred to six hundred and fifty or just four?

A Four hundred to six hundred and fifty.

. . . .

[57]

Q Let me get rid of the rule of thumb. I think we might place undue emphasis on it. In performing your duties back in '73 and '76, how much time did you spend taking care of Kohl's, Sentry, and the vending classification as well as doing whatever you do in securing those accounts and having good relations as

opposed to having contacts with your sales representatives and, for instance, going riding with them for a day?

A I tried to spend a minimum of fifty percent of the time with the field representatives. Then my other responsibilities such as calling on the direct accounts myself and/or territory analysis took another thirty, thirty-five percent of my time. So field activities probably took eighty, eighty-five percent of my time.

. . . .

[58]

Q Did you have any function with respect to the promotion of sales representatives within your region? Was there anyplace to be promoted?

A Not at that time, not within the region, because at that time we didn't have key account positions and some of the positions we now have.

. . . .

Q Did the regional sales manager also make recommendations regarding raises for the sales representatives?

A Correct. I would recommend, and Gerry would have the

[59]

final say as to the date and the amount. I would only recommend.

. . . .

Q And does the district sales manager get involved if, for instance, if the regional sales manager figures, well heck, this is just one territory. He's all out of size with regard to another. We have got -- I have got to reassign this. Does he just go ahead on his own and reassign the area to someone else?

A Well, if you realign it, you do so. Then everything is

[60]

submitted to the district office.

Q I see. And is realignment a process or redrawing territory lines?

A Correct.

Q And suppose you made a decision that these territory lines should be redrawn, do you redraw them and then submit them for the approval of the district office?

A Correct.

Q And then Mr. Marx would be the authority that would say, "Yes, that's a good idea"?

A He might say, "Sounds great. Go ahead and do it. Looks good."

Q Did Mr. Marx ever, when you proposed to redraw lines, did Mr. Marx ever say to you, "I don't like that"?

A No.

Q Did you assign duties to the sales representatives as a routine matter?

A What do you mean by duties?

Q Well, for instance, did you tell them, "Well, I want you to take this particular account and do it," or "I want you to go into the City of Wausau and go to all the supermarkets," or things like that?

A Yes. I basically determined the day-to-day activities.

Q Would that be fairly illustrative of you making work assignments to some of the sales representatives?

[61]

A That was just part of the job. It's a function of the job.

Q And would this be a kind of thing you might do very, very frequently; for instance, every day you might have some idea or not so frequently?

A No, no.

Q How often would you, for instance, tell a sales representative "I think we are weak in the Wausau supermarkets. I want you to spend some of your time going to them"?

A I would just do that on a one to one basis with the field representative.

Q I see. Did all of the field -- Did all of the sales representatives work at your direction?

A Well, first of all, we are all trying to carry out the company goals as well as the district goals and as well as the regional goals, so you have it three-fold.

. . . .

[65]

COMMISSIONER SMITH: Before you do so, I'll ask the question that I had intended to ask. Mr. Kroyer, were there ever any instances in which you were riding with the district -- with a district -- or a sales representative, presumably in the company car assigned to him, if I understand the procedure, but you were going right by the office of a vending machine company of the Sentry or Kohl's home office. Were there any such instances in which you would interrupt your coordination of the work of the individual sales representative by stopping to check with one of those direct accounts?

THE WITNESS: I wouldn't think so much with Kohl's or Sentry but more than likely a representative could have made the vending call with me.

[66]

COMMISSIONER SMITH: All right. So that when you are estimating your fifty percent of time with the field representatives, that could well have included some contact with these vending machine operators or vice versa?

THE WITNESS: That's accurate.

COMMISSIONER SMITH: Would it be correct to suppose that although you were making primarily contact with a vending machine company, that the field representative would also ride along on that?

THE WITNESS: Could have happened, yes.

COMMISSIONER SMITH: And he would participate rather than sit in the car while you were there?

THE WITNESS: Yes, most definitely. All of the field representatives knew the vendors because I couldn't be every place at all times. So they would help out locations. Just the primary responsibilities with the vendors fell with me.

. . . .

[95]

Q Mr. Kroyer, does a regional -- did you as a regional manager in the State of Wisconsin in 1973 to 1976 period or any sales representatives working in Wisconsin during that period have any responsibility whatsoever with placement of local ads?

A None whatsoever. It's all determined by our people in Chicago and the ad agencies. We have in the field no input.

. . . .

. . . .

[99]

Q Would you state your name for the record and spell your last name?

A Gary James Hecht, H-e-c-h-t.

. . . .

Q Would you briefly describe your employment history with the Wrigley Company?

A Yes. I was hired in Milwaukee in 1965. I transferred to Davenport, Iowa in 1969 as a field representative. I beg your pardon. I transferred to Omaha, Nebraska in 1969 in March, and then in August of '69 I transferred to Davenport, Iowa. And in March of 1976

I was promoted to regional sales manager and transferred back to Milwaukee.

[100]

Q Did you experience any changes in the boundaries of the region during the period of 1976 to 1978 when you were regional manger in the State of Wisconsin?

A Yes.

Q About six months after I came to Milwaukee, would have been maybe September or October in 1976, they created an additional region in the Midwestern district located in

[101]

Peoria, Illinois, and at that time the representative who was headquartered in Rockford was taken out of my region and assigned to the Peoria region. That included the -- Part of that territory included some counties in Wisconsin which included Rock County, Janesville, Beloit, that area, and also -- and I don't know if it coincided with the creating of the Peoria, but about that same time, maybe it was early 1979, the company had an overall readjustment and regional boundaries. And at that time the western portion of the state, western counties in the State of Wisconsin including the Iowa area, Dubuque, was also taken out of the region then and so was Kenosha County, Wisconsin.

. . . .

Q So for the majo: part of the time when you served as regional manager in the State of Wisconsin during the '76 to '78 period, is it your understanding that the region,

[102]

the Wisconsin region or Milwaukee region as it has been described, was smaller than it had previously been?

A Yes. When I took over, there were five representatives, and within a year it had changed to four representatives.

Q Directing your attention to the 1976 to 1978 period in which you served as regional manager in Wisconsin, did your duties as regional manager include responsibility for soliciting sales from key accounts in the Wisconsin area?

A Yes.

Q What is your understanding of the term key account?

A We have twenty percent -- approximately twenty percent of our direct accounts are responsible for eighty percent of our total volume, and any one of those twenty percent group accounts is considered a key account.

Q So are you saying then that having responsibility for key accounts is synonymous with having responsibility for approximately eighty percent of the total volume of that period of time?

A If I was responsible for all of the key accounts, yes.

Q Did being responsible for key accounts involve spending a portion of your time out in the field making sales calls on accounts?

A Yes.

Q What was your purpose when you made a call on a key

[103]

account or a major account in the 1976 to 1978 period?

A Well, the primary purpose was to solicit business via increasing distribution of our brands and packaging or implement selling and implementing a display of a merchandising program and/or presenting and obtaining an order for promotional sales.

Q Now, when you are talking about soliciting business from a key account, does that often involve an extended, in terms of days, weeks, months, period of time in order to achieve a particular result with respect to ultimate solicitation of sales?

A Yes, it does. I could cite an example. When I took over in 1976, the Sentry stores, which is operated by the Godfrey Company, did not merchandise chewing gum at their checkouts. This is a major goal of our company to have such merchandise, and it takes repeated attempts to get approval to convince them to merchandise at the checkouts. From the time they first indicated an interest to merchandise at the checkouts to the time we finally implemented a program at their checkouts, they ran about three years. It was three years of ongoing negotiation with numerous people within the organization all who were involved in the decision-making process.

Q Could you estimate for me the portion or percentage of your working time that you spent out in the field in

[104]

connection with the solicitation of sales from key accounts during the 1976 to 1978 period?

A I'd say between forty and sixty percent.

Q Was the majority of this time spent in connection of key accounts solo time; that is, time in which you were involved primarily alone in connection with these solicitation activities?

A It's really difficult to nail down percentages because some of the accounts I was directly responsible for and some of the accounts I called on with representatives. I would say forty percent of my time was spent solely on headquarter activity.

Q And an additional portion of your time was spent in the company of sales representatives in connection with solicitation of sales activities?

A Yes, at headquarter level, correct.

Q Did you also spend a portion of your time, either alone or in the company of sales representatives, on sales calls of accounts other than key accounts?

A Yes.

Q Have you any idea how much time in terms of percentage of working time that you devoted to being out in the field making sales calls in connection with accounts other than key accounts?

A Again, we are talking about the 1976 to 1978 period.

[105]

A Well, the non-key accounts could be direct accounts, could be headquarter type calls. Non-key accounts -- it could also be retail-oriented calls, and it might be another thirty to forty percent.

Q Just by way of clarification, what percentage of your working time would you say that you devoted to activities in the field in connection with solicitation of sales, either with respect to key accounts or with respect to non-key accounts, whether they be headquarter accounts or other types of accounts; in other words, the total amount of your working time?

A Ninety to ninety-five percent.

Q Now, in addition to your key account work which included field work in connection with our sales representatives and/or in field work in connection with non-key accounts, did you also devote a portion of your time to conducting sales meetings of your representatives?

A A very small portion.

Q During the 1976 to 1978 period, how often did you hold group meetings of your sales representatives?

A Once, possibly twice per year.

Q Where were such meetings typically held?

A Typically at a hotel or motel.

Q How long does such a meeting typically last?

A Typically a day.

[106]

Q And what was the purpose of such meeting?

A Generally it was when the company had a major thrust or objective such as the introduction of a new brand or a new packaging, major goal such as that, of which the details were important to communicate

accurately and necessitated getting together with the field representatives face to face, and group meetings seemed to be the best avenue to take.

. . . .

Q Can you describe the managerial work that you did?

A Well, since the advent of the photostat machine, there seems to be a lot of administrative -- a lot of communicative type of duties. Primarily it was administrative work, either corresponding to the -- to my superiors what was taking place in the field or communicating occasionally with the representatives as to direction that we should take or strategizing what needed

[107]

to be done to build sales, as well as reading and monitoring the daily reports that the field representatives submitted to me which was an account of their work.

Q What was your typical method for communicating with sales representatives during that '76-78 period?

A Telephone.

Q You estimate approximately what percentage of your communications with the representatives occurred by phone?

A Most of them spoke with the representatives by phone almost daily, ninety, ninety-five percent.

Q During this period of time, did you also spend time out in the field substituting for representatives who were ill or on vacation or who had quit and were no longer working for the Wrigley Company?

A Absolutely.

Q Was that the normal procedure at that time for you to fill in for individual representatives who, for one reason or another, could not fulfill their duties in their particular area?

A Well, when a representative left for one reason or another, the work load still remained, and general procedure was I would fill in, make the, particularly, the headquarter calls or important retail calls. If it

[108]

was feasible to close the ranks by having some of the other representatives fill in a portion geographically, that also might have been incorporated; but I had a carrying bag just like the representatives and would go out and make the calls.

COMMISSIONER SMITH: Mr. Hecht, will you define headquarter calls or headquarter work? You used the term headquarter calls.

THE WITNESS: Yes. Headquarter call would be contact on a buying office or warehouse of an operation that usually had three or more retail outlets.

. . . .

Q How did the process for hiring new sales representatives during the 1976 to 1978 period work?

A Well, if someone left the Wrigley Company, the first thing I would have to do is receive permission from my superior to fill that vacancy in the location where it occurred. Second order of business, once getting that approval, would be to select a candidate. If I happen to

[109]

know somebody or had some referrals from our employees, I would interview those people. If I didn't have any in my hip pocket, then I would place an ad in the newspaper and contact job service. Does that fully answer your question?

Q Yes. And assuming an application and response to those activities was received, did you then conduct an interview of an applicant?

A Yes. In the ad we asked for resumes, and upon receiving resumes, we would contact the respondents; and I would set up interviews and go through the selection process and usually get down to about two or three potential candidates. I would then brief my superior as to the background of these candidates and arrange a second or possibly third interview at which time the district manager might have accompanied me, and the final decision would be made as to who would get the job.

Q Where did the interviews that you have just described take place?

A Well, if I was out of town, for instance, in Green Bay or Madison or -- well, Green Bay I can speak -- usually at the hotel where I was staying in my room. If it was in Milwaukee, at that period of time probably at a Big Boy restaurant or whatever table space might be available.

[110]

Q Who made the final decision with respect to whether an applicant was hired?

A Well, my district manager would have had the final decision.

Q Is that also true with respect to whether a particular employee was terminated?

A Yes.

Q During the period of time in which you served as a sales representative for Wrigley, did Wrigley at any time maintain an office in the State of Wisconsin? Excuse me, regional manager?

A No.

Q Similarly during the 1976 to 1978 period when you were regional manager in Wisconsin, did Wrigley own or rent any real estate in the State of Wisconsin?

A Not to my knowledge.

Q During that same period of time, did the Wrigley Company ever have a listing in the telephone directory?

A No.

Q During the '76 to '78 period when you were regional manager, did either you or any of the representatives in the region in which you worked have any discretion with respect to pricing the Wrigley product?

A None whatsoever.

Q During the period of time in which you served as a

[111]

regional manger, specifically 1976 to 1978, did the Wrigley Company maintain manufacturing facilities in the State of Wisconsin?

A No.

Q All Wrigley products are shipped into the State of Wisconsin by common carrier?

A That's correct.

Q All orders for Wrigley products generated in Wisconsin are accepted and filled in Chicago?

A That is correct.

Q What information, again referring to the 1976 to 1978 period, what information was printed on the business cards of your sales representatives?

A I think a logo of our four brands of chewing gum, company name, the Midwestern district telephone number and address, and the representative's name.

Q Was the representative's telephone number printed on the card?

A No.

Q Mr. Hecht, I'm going to show you what's been marked as Exhibit B. Take a look at that, please. Would you identify that document, please?

A It appears to be our current order form for taking orders from accounts.

Q Is that order form essentially the same as the order form

[112]

which was utilized in the 1976 to 1978 period?

A Essentially except it contains a few more items that we now manufacture we didn't then.

Q Directing your attention to the bottom lower left-hand portion of the form, what language is printed at the very bottom of the form in the lower lefthand portion?

A It says all orders are subject to acceptance or rejection by the William Wrigley Junior Company.

. . . .

Q Mr. Hecht, did you ever have occasion in the 1976 to 1978 period when you were a regional manager to conduct a seminar or training session for a customer with respect to the use of Wrigley product?

A No.

Q Or with respect to repair or maintenance of Wrigley display cases?

A Not to my recollection.

Q During the period in which you served as regional manager

[113]

in Wisconsin, specifically the 1976 to 1978 period, did you or any of your sales representatives in Wisconsin have occasion to approve or disapprove a grant of credit to a customer?

A No.

Q Where were the decisions with respect to granting or disapproval of credit made?

A We have a credit department in our corporate office who makes those decisions.

Q And where is that office?

A In Chicago.

Q So neither you nor your sales representatives have anything to do with credit?

A No.

Q During the period in which you served as the regional manager in Wisconsin, specifically the 1976 to 1978 period, did you have occasion to accept a check from a customer in payment of an outstanding balance?

A No.

Q An account -- Again with reference to the 1976 to 1978 period when you were regional manager in Wisconsin, when an occasion would arise when an account became overdue, were you involved in that?

A Not directly. I received copies of correspondence that went from our credit department to the account which

[114]

outlined the invoices that may have been past due or any other problem that our credit department may have been experiencing. I received copies of this correspondence.

Q During the 1976 to 1978 period of time, how many copies of such correspondence did you typically receive in the course of a year?

A That's real tough to say because some customers have accounting methods that tend to generate these types of letters regularly, but in a given month I'd say I might see ten to twenty such letters go out to customers.

Q What, if anything, did you do in response to receiving these copies from the letters from the credit department in Chicago to the customers?

A I usually threw them in the wastebasket. I don't mean to be facetious, but it didn't involve me, and once I read them, I discarded them because it required no action on my part.

. . . .

[115]

Q Mr. Hecht, I believe you testified that during most, if

[116]

not all, of the 1976 to 1978 period when you were regional manager, Gerry Marx was the district manager for the region which included Wisconsin?

A '76 to '78. It might have been right toward the tail end of '78 that he transferred to another department. He was the district manager for most of that time.

Q Could you briefly describe the district manager's functions during that period of time?

A Well, he was in the decision-making capacity, and he was responsible for all activities that took place within the geographical boundaries of the districts including decisions on hiring and firing and sales strategies. He was accountable for sales and distribution of our products.

Q During the 1976 to 1978 period, did Mr. Marx have occasion to come into Wisconsin?

A Yes.

Q Approximately how many working days in the course of a year during that period of time did Mr. Marx spend in Wisconsin?

A Well, 1976 in March I was new in my position, so he probably spent a little more time in Wisconsin with me or with my representatives, but normally I would say six to eight, nine days something like that.

Q Were some of those days or portions of those days

[117]

actually spent out in the field with Mr. Marx out in the field?

A All of these days were spent in the field.

Q That is, Mr. Marx got involved in sales calls on various types of points?

A Absolutely. He may have been with me calling on a customer. He may have been with one of the representatives calling on a customer, or on occasion he may have been calling on a customer by himself; but it always represented calling on a customer to sell our product.

Q Did Mr. Marx also attend any sales meetings during the 1976 to 1978 period?

A I believe, yes.

Q How often?

A Well, as I mentioned, we had one, possibly two per year, and I don't believe he was in all of them. So during that period there may have been anywhere from two to four, and he may have been at one to two.

I really don't recollect, but being a new regional manager, I was almost certain he was at at least one.

. . . .

[118]

Q Mr. Hecht, are you familiar with the situation that pertains to Mr. Kuckkahn in the rental of Reynolds Transfer and Storage for him to keep his supply of gum and displays in?

A Yes.

Q And did that situation -- Was that the situation in 1976 and 19 -- through 1978?

A Yes.

. . . .

Q Do you happen to know how much that cost per year for storage charges at Reynolds Transfer and Storage for Mr. Kuckkahn's materials?

. . . .

[119]

THE WITNESS: Fine. I understand. To my knowledge, I would estimate at less than three hundred dollars per year.

BY MR. GREENWALD:

Q I see. And as far as you know, the only thing that's being stored is either a supply of fresh gum or displays or possibly stale gum or which?

A A combination of all three.

Q All three are likely to be stored?

A Um-hum.

Q Was anything else likely to be stored in connection with Mr. Kuckkahn's situation?

A No.

. . . .

[122]

Q You testified regarding what I interpreted to be some Dunning (sic.) letters; is that the correct term, that when somebody is sent a letter requesting them to pay the bill and threatening some action? Did you get copies of

[123]

those?

A First of all, I'm not familiar with the term Dunning. Secondly, the letters that we sent to customers were more in the form of a reminder that a bill was still outstanding as opposed to a threatening letter.

Q I see. Were the letters you referred to, did they eminate from the Wrigley Company?

A Yes, they did.
Q And those were the ones you threw in the wastepaper basket?

A By and large, yes.

. . . .

[125]

Q How many vacancies in sales representative positions did you have in 1976?

A I don't think I had any in 1976.

. . . .

[126]

Q And did you have any vacancies in '77?

A Yes. I was coming back to that question. I believe I had one, possibly two in '77.

Q And did you have -- And how did you go about recruiting for those two positions?

A I would have contacted -- Let me think of who I hired. I believe it was through an ad in the paper. I would have contacted job service, possibly the local universities, and put an ad in the papers.

. . . .

[127]

Q And how about for the Radosevic vacancy?

A It seems to me that I did not have to advertise for Rick. I believe I had received a referral from somebody with Rick, and I don't think I interviewed as many. I would have interviewed more than just himself, but I don't

[128]

remember how many others.

Q And that takes care of all the hiring that took place during that period as far as you were concerned?

A As far as I can remember.

Q What did you do in terms of orienting these people to their new positions?

A Well, we had a system very similar to what John Kroyer described insomuch as the first day or two might have been spent with the new hire and myself whereby materials and his automobile would be turned over to him. At that point he would spend the next three weeks working with one of our veteran salespeople, about one person per week, covering various subject matter. Following that, his fourth week, I would work with him. Beyond four weeks, we pretty much felt the individual was capable of beginning on his own, but he would work with the regional manager periodically to ensure that he was fully knowledgeable, capable of handling his responsibilities.

Q And did you make periodic job performance evaluations of these sales representatives that were assigned to your region?

A Yes.

Q Did you have anything to do with any promotions relative to any of the sales representatives?

A Well, I could not authorize an employee promotion for

[129]

anyone. I could recommend or discuss the talents of an individual, but his promotion would be a responsibility of my superior or someone else in Chicago.

Q And did you have any authority relative to their compensation?

A No. The amounts of compensation with the ranges were predetermined through our personel offfice. I would recommend an amount commensurate within that range and the district manager would approve or disprove that amount or perhaps change that amount, depending upon his view of the representative's performance and his own district budget.

Q Did you have any authority with regard to the discharge of persons who were employed as sales representatives within your region?

A I did not have the authority in ordinary circumstances to discharge someone. However, I would be the first to know if someone were not performing to standard at which time I would discuss the matter with my superior, and the next steps or strategy would be worked out. It usually would involve sitting down with the representative, advising him of the nature of the problem, recommending corrective angles, and if necessary, writing a letter of probation. Following that, if the directive wasn't acted upon, the final decision would be arrived at through the district

[130]

manager and myself, and I would be responsible for the physical aspect of the termination.

Q What you mean by that is to tell the person they were fired?

A Exactly.

. . . .

[133]

Q I think earlier in your examination you indicated that you might indeed spend almost one hundred percent of your time calling on various accounts; is that accurate?

A I don't think that is.

Q Well, let me tell you what I have reference to. You indicated that perhaps you would be calling on your own accounts alone forty percent of the time, and twenty percent of the time you might be accompanied by sales representatives. And then thirty or forty percent of the time you might be calling on either direct non-key or retail accounts. Now, that strikes me that if you add that all up --

A Well, I think if you would check the record, I was referring to a range of time. The first part I mentioned forty to sixty percent, and as we detailed, I made mention of the fact that some of this time overlapped. So it was difficult to come down to a specific percentage of time, but to be more specific, I said ninety to ninety-five percent of my time was spent in the field.

. . . .

[136]

Q Did you have occasion to take any adverse personnel action against any of your sales representatives?

A You mean by adverse, firing them?

Q Firing them, writing a letter of reprimand, or just those two.

A During that period of time we are speaking, '76 to '78, I am certain that one individual was fired, and during

that time it may have been two. And if they were fired, I'm certain there would have been a letter of reprimand made.

Q Do you know the -- Do you know what year you -- Did you fire anybody in '76?

A No.

Q Did you fire anybody in '77?

A Yes.

Q And what was the name of the individual?

A Greg Gabryz.

Q How do you spell his last name?

A Now, you know -- Let me back up for a minute. To my recollection, I'm not entirely certain if I fired Greg

[137]

Gabrys or if he quit. I just can't remember.

. . . .

Q And what was the other individual?

A I know that Mike Perlewitz was fired.

Q Why was he fired?

A He did not perform the job satisfactorily.

Q Did you recommend that he be fired?

A Yes, I did.

Q Did your district sales manager agree with you and concur in that and was he fired?

A Yes, sir.

. . . .

COMMISSIONER SMITH: All right. We'll go back on the record. We'll declare a break momentarily, but Mr. Hecht, while I have it in mind, the letter, left corner of Exhibit B, contains the statement "orders were subject to acceptance or rejection by the home office in or near Chicago." Do I presume that in the ordinary course of business, the acceptance consisted simply of filling the orders; is that right?

[138]

THE WITNESS: Ordinarily that's what one would think. However, there are some packagings, for instance,that we prefer certain trade classes not receive. If the trade class has ordered that type of package, people in Chicago would determine that they would not maybe want to fill that particular order or when someone orders product, they may submit it on a purchase order stating their own terms. They will purchase the product if they can fill the bill in forty-five days in which case our company could say we can't accept the order.

COMMISSIONER SMITH: And that leads to the next part of my question. Suppose that a particular customer developed a representation for being slow pay or argumentative on the quality of the products or something of the sort. Do you know of any instances in which the home office rejected the order?

THE WITNESS: I know that there have been occasions when at first, if they were slow pay, the company, the credit department, would notify the account that they would accept future orders only with a certified check. Sometimes they customer would go along with that, and other times the customer may decide that they can't go with those terms and choose to purchase our product through another source of supply or not to carry

[139]

our product.

. . . .

[143]

BY MR. GREENWALD: Yes. If you would look at Exhibit 21 that's the next exhibit on the dias. Can you identify what Exhibit 21 is?

A The cover page is a letter to Mr. Clauter indicating that four people within his district would be receiving a salary increase effective September 1st. And there is a check next to the name of Mr. Cichocki. Mr. Cichocki was in my region.

Q And is page two of the exhibit a report by yourself to your supervisor grading Mr. Cichocki?

A It appears that's exactly what it is.

Q And is pages three and four essentially the same for a different time period?

A Essentially, yes.

Q And in both of those grading reports, they also recommend salary increases; do they not?

A Yes, they do.

Q And the pages that are authored by Mr. Marx would indicate his action on your recommendation?

A Understand that the amounts that are inserted here as a salary recommendation come off of a salary chart that is supplied by Wrigley Corporate indicating the amount of money that can be given for certain performances, so what I have done is indicate that amount of money based on

[144]

that chart. And then it appears that Mr. Marx may have double checked to see if that in fact was correct or fit in with his budget, and based on his findings it appears that he okayed that recommendation.

Q If you had determined that this particular sales representative hadn't been doing his job, could you have recommended that he not get a salary increase at all?

A What I could have recommended is that his performance was less than what was expected, and whether or not he received it, he would have been given a performance rating which would have put him at a certain level. That level would have dictated whether or not he was eligible for an increase at that time. And that's determined by people in Chicago.

Q Well, just taking the last page, there is an indication, or as an example, for instance, it starts off "strongly recommended that consideration be given" -- your representative, and his name -- "a fifty dollar per month salary increase." Could you have said I recommend that this person not be given any increase unless the salary schedule requires that he get one?

A I could have made that recommendation if I would substantiate it as to why.

MR. GREENWALD: I offer Exhibit 21 in evidence.

. . . .

[160]

Q Mr. Hecht, during the 1976 to 1978 period when you were

[161]

regional manager in the State of Wisconsin, do I understand that representatives in your area kept on hand a supply of gum utilized for samples and exchange purposes?

A Yes, they did.

Q Could you estimate for me the approximate dollar value of the gum typically kept on hand by an individual representative at any one time during the '76 to '78 period?

A I could if you give me a minute to think about it. I'd say between seven hundred dollars and a thousand dollars.

Q Mr. Hecht, during the testimony you have just given, you have from time to time used the first person plural we and us in responding to a number of questions that have been presented to you. Would it be fair to say in each of those cases that your reference to we and to us is a reference to the Wrigley Company?

A Yes.

Q With respect to the orientation that you have testified that new representatives went through at the beginning of their tenure, was all of this orientation in field orientation?

A Yes, it was on the job training.

Q And did this on the job training occur within the context of sales calls being made during that period of time?

[162]

A Yes.

Q Mr. Hecht, you have testified to I believe what's been termed a redrawing of retail sales boundaries, and I believe you characterized that redrawing as occasional; is that correct?

A That is correct.

Q Approximately how many times during the course of the 1976 to 1978 period did such a redrawing of boundaries occur?

A I think during that period it happened once.

Q And would that have been in connection with a change in the number of sales representatives working within the region?

A Yes.

Q Mr. Hecht, you responded to a lot of questions relating to various performance appraisals for sales representatives.

A Um-hum.

Q In your region during that particular period of time, -how often were such reports submitted to Mr. Marx?

A For the majority I'd say at least one a year. I should say at least once a year, but once a year. At that point in time representatives were evaluated on an annual basis.

Q So the norm was once a year?

[163]

A Right.

Q So if you had four sales representatives within your region, you generally submitted a total of four reports in the course of a year?

A That's correct.

Q Directing your attention to Exhibit 23 --

A Yes.

Q -- specifically to the fourth paragraph of Exhibit 23, this additional coaching which is referenced in the fourth paragraph of 23?

A Which page are you -- Okay.

Q That would help, wouldn't it? Third from the last page.

A I have it.

Q Fourth paragraph, would this additional coaching take place in the field in connection with sales calls?

A Absolutely.

Q And directing your attention to the very last paragraph of that page of Exhibit 23 which paragraph reads "he received his last raise on November lst and based on his good development, I'm recommending a salary increase of fifty-five dollars per month effective 4-1-77", was that the type written portion as it appeared when you submitted it to Mr. Marx?

A I recommended fifty-five dollars, and he overrode my recommendation and raised it to sixty dollars.

[164]

Q So the handwritten sixty dollars, which is written over the fifty dollars there, which comes below or above.

A In addition to that I recommended it become effective on April lst and he made it effective March lst.

Q Directing your attention to Exhibit 25 --

A Yes.

Q -- specifically to page four of Exhibit 25, the reference to ongoing guidance to which you have testified?

A Yes.

Q Would that guidance take place in the field and in connection or in the context of sales calls being made on customers?

A Yes.

Q And three pages further in the same exhibit --

A You are referring to --

Q I'm referring to a page which is dated 10-25-76?

A Um-hum.

Q Subject is T. Albers rating report?

A Yes.

Q And specifically to the third paragraph of that page.

A Um-hum.

Q Does that paragraph reflect that you recommended a salary increase of sixty-five dollars?

A Yes, that's what I recommended, but that's not what happened.

[165]

Q What happened?

A Mr. Marx overrode my recommendation, and in this case he allowed a sixty dollar increase.

. . . .

Q Directing your attention to Exhibit 26 --

A Yes.

Q -- and specifically to the sixth page of Exhibit 26 which page is dated 8-15-77 and entitled subject, R. J. Kuckkahn grading report --

A Yes.

Q -- and specifically to the last paragraph of Exhibit 26, does that paragraph indicate that you recommended an

[166]

increase of ninety-five dollars?

A That's correct.

Q But that that increase is crossed out and that Mr. Marx instead substituted an increase of eighty dollars?

A That is correct.

. . . .

[168]

Q If you would state your name, please?

A Richard J. Kuckkahn.

. . . .

Q Mr. Kuckkahn, you have had an opportunity to inspect

[169]

Exhibit 15. What position did you assume in October of 1973 when you were hired by the Wrigley Company?

A Field representative.

. . . .

Q Could you describe in your own words what your duties have been in that position? Let me first ask you, have you continued in that same position through 1978?

A Yes.

Q And how would you describe your duties?

A I describe them as primarily to maintain the sales of the product that we have presently and then to use whatever tools that have been given to us to increase the sales.

Q Does this involve making calls on both direct accounts and indirect accounts?

A Yes.

Q What do you try to accomplish when you are calling on a direct account?

A It depends on the direct account.

Q And what does it involve in terms of physical activity on your part? Is it a meeting with the purchasing officials for the direct account or what?

[170]

A Again, it just depends on the type of direct account.

Q And would you just describe the scenario if you were to call on an indirect account in terms of what you might most likely do when you arrive at that retailer's store?

A Okay. It would involve making a physical appraisal of the condition of the store as far as our merchandising -- merchandising of our product. It would be coming prepared to the account with any specific goals or objectives that I might have or the company might have that would relate to that account. It would mean contacting the key person in the store in that account for the goal of accomplishing any of those objectives that the company might have or to inform the accounts

of any problems or opportunities that the accounts might have in regards to our product.

Q Would the making of the physical appraisal involve looking over the displays and seeing how many different brands of Wrigley gum are being displayed. Is that part of that?

A Yes.

Q Do you also check the dates on the chewing gum to see whether it's stale?

A Yes.

Q And how do you determine if a piece of gum is stale?

A The company has an open dating practice on the side of each box. It's plainly printed that the product is fresh only until such and such a date, and on other packaging there is a number imprinted on the side of the package itself which represents the month that it was produced. And we know at that time the product was good. It remained fresh for six to seven months.

Q Do you have with you now a package of gum that might be similar to the package that would be sitting on a retailer's shelf in that box?

A Yes.

Q Could you take that out, please?

A This is a typical box.

Q Could you tell from examining the box that you are holding whether it is stale or not?

A Yes.

Q And how do you do that?

A It stays here on the side that the quality insurance date is November 9th of '85 which tells me that it's fresh until November 9th of 1985.

Q Now, if the gum is sitting on the retailer's shelf and the date has passed, what do you do then?

A Well, I check to see if there is anymore.

Q Okay. And you have made your total check and you know that it's just that one package. What do you do then?

A Then I notify the appropriate personnel in the store and

[172]

suggest to them that I take that out of the store and replace it with something that's fresh.

Q I see. And does that cost the retailer anything for you making that change?

A No.

Q And then what do you do with the stale gum?

A I maintain it until the supply is sufficient enough to well warrant -- or becomes a problem for me, and then it's destroyed. At that time we would package it up into cases and seal it and send it back to Chicago.

. . . .

[173]

Q Mr. Kuckkahn, I take it that the sample that shows it's fresh until November 9 of '85 is similar to what occurred during the period '73 to '78; is that correct?

A Yes.

. . . .

[174]

Q Now, what about the situation where you are putting in a new display stand. Do you ever stock that display stand from gum that you are carrying with you?

A Occasionally.

Q And how frequently might you do that?

A Back then maybe once a month.

Q And what happens -- First of all, do you suggest that you stock the stand, or does the retailer ask you to stock the stand?

[175]

A Boy, that's -- Generally, it's a upon request I think.

Q And what happens after you have taken the gum from your vehicle and you put it in the stand? What happens in terms of is that then transferred to the retailer without any charge to him?

A No.

Q How does it wind up that the retailer pays for this gum?

A It would one of two ways, I believe, or primarily two ways. I would either inform his supplier that he had accepted some merchandise, and then that supplier in turn would bill him; and then I would replenish my stock from that supplier's stock. In other words, if I gave a restaurant a box of Doublemint gum, I would write a receipt that I made that transaction with the retailer. I would go to the wholesaler and say "I just made this transaction with this account. Here is the receipt." I would pick up one box of Doublemint gum. He in turn would bill him, or I would fill out one of those agency stock transactions that we have, and that in turn would go to Chicago. And Chicago in turn would bill the supplier, and the supplier in turn would bill the retail account.

Q And you indicated that this might happen once a month that this kind of transaction took place and that would be true for this entire six year period or five and some

[176]

months that we are talking about?

A Yes.

Q Was your supply of gum and stands stored at Reynolds Transfer and Storage in Madison, Wisconsin?

A Yes.

Q And did you get billed personally for the storage?

A I never got billed. I went right to the office every month and just paid the feed.

Q And then did you put the payment you made to Reynolds on your expense account?

A Yes.

Q And you received reimbursement from Wrigley for it?

A Yes.

. . . .

[178]

Q And the supply of product that you kept on hand for sample purposes and exchange of fresh gum for stale gum purposes, how would you estimate the value of the supply of gum you generally had on hand at any one time during that period of time?

A You mean an average cost?

Q Average.

A Again, probably a thousand dollars in ballpark figure.

COMMISSIONER SMITH: Mr. Kuckkahn, we have talked throughout about average value here, but everybody has neglected to mention whether this was retail or wholesale value. Which are you speaking of?

THE WITNESS: Wholesale.

. . . .

Q In these situations where you will stock a stand for a retailer, can you estimate on the average how much gum -- the retail value of the gum you are transferring to?

[179]

A The value of the gum that I transferred, not that he already had?

Q Right.

A Okay. Wholesale?

Q No, retail value.

A Retail, less than twenty dollars.

Q So that would be your average figure? It would be less than twenty and maybe more than fifteen if you were to take a range?

A Well, I would say the range would probably be more like eight dollars to -- eight to six, twelve or sixteen dollars, but it would never be more than, I would say, twenty dollars.

. . . .

COMMISSIONER SMITH: Mr. Kuckkahn, one question that has crossed my mind repeatedly, as I understand it, the sales business is largely impulse in nature. During the course of your work as a sales representative for Wrigley, if a merchant had a stand similar to the one that you have here in the back corner of the store somewhere instead of up near the cash register, what, if anything, would you do to attempt to get him or her to change the location?

THE WITNESS: Well, I would attempt to bring him to the conclusion that it would be in his best

[180]

interest to move it to an area that would receive higher traffic.

COMMISSIONER SMITH: All right. From someone's testimony earlier, I understood that you encouraged retailers who located these products near

the cash register, the impression that I got without anybody saying it, was because a retailer would realize a higher profit margin on the sale of those items than he would have. I don't know how accurate it is to compare flashlight batteries or something else that is frequently located near a cash register, but is it correct that the retailer would be encouraged by this relatively high margin in connection with your products as contrasted with magazines or something else that might be near a cash register?

THE WITNESS: That's a fair statement.

. . . .

Q Mr. Kuckkahn, you have given testimony with respect to what types of activities you might engage in in making a

[181]

call on an indirect account. What percentage of time in which you engaged in those activities would you estimate that you did so with the purpose of increasing sales of Wrigley gum?

A In almost every instance the purpose is to increase sales.

Q So that's true with respect to the activities which precede the conversation or the sales presentation that you make to the individual of that account with whom you deal?

A Yes.

EXHIBIT 13

[William Wrigley, Jr. Co. Letterhead]

October 13, 1978

Department of Revenue
Central Compliance Section
P.O. Box 8902
Madison, Wisconsin 53708

Attn: Mr. R. L. Blodgett

Gentlemen:

In response to your letter dated September 19, 1978, the Wm. Wrigley Jr. Company has four representatives who live and work in Wisconsin. In addition, two other nonresident representatives spend approximately 25% of their time in Wisconsin.

The average value of gum carried by each representative is approximately $3,750. Displays are shipped to the representatives from Chicago, who give them free of charge to the retailers. The amount of displays any representative would have on hand at any one time is estimated to be $3,000.00. The total cost of displays shipped to Wisconsin amounted to $45,000.00 in 1976 and $63,000.00 in 1977.

If we can be of any further assistance please let us know.

Yours very truly,
WM. WRIGLEY JR.
COMPANY

/s/ Gary E. Smith

Gary E. Smith

GES:rc

(5)

No. 91-119

Supreme Court, U.S.
FILED
NOV 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court correctly determined that Wisconsin's franchise tax statute was preempted by the provisions of Pub. L. No. 86-272 on the basis that the only nexus between the William Wrigley, Jr. Co. and the State of Wisconsin consisted of the solicitation of orders for approval and delivery from a point outside the state.

LIST OF PARTIES

The parties to this action are the Wisconsin Department of Revenue and the William Wrigley, Jr. Company.

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THE WISCONSIN SUPREME COURT INCORRECTLY DETERMINED THAT WISCONSIN'S FRANCHISE TAX STATUTE WAS PREEMPTED BY THE PROVISIONS OF PUB. L. NO. 86-272 ON THE BASIS THAT THE ONLY NEXUS BETWEEN THE WILLIAM WRIGLEY, JR. CO. AND THE STATE OF WISCONSIN CONSISTED OF THE SOLICITATION OF ORDERS FOR APPROVAL AND DELIVERY FROM A POINT OUTSIDE THE STATE. 15

A. The Wisconsin Supreme Court's Decision Fails to Construe § 381 In A Manner Consistent With The Court's Decisions Concerning Commerce Clause Preemption. . 15

1. In exercising its powers under the Commerce Clause, Congress is presumed not to have significantly altered the preexisting authority of the states unless it uses unmistakable language to do so. 15

2. A uniform pre-sale/post-sale standard for determining solicitation immunity accommodates Congress' objectives of predictability and certainty in making nexus determinations while simultaneously preserving the states' preexisting taxing authority to the extent permissible under the language employed by Congress in § 381. 18

a. The statute contains no industry-specific standard. 18

b. The pre-sale/post-sale standard preserves Congress' goal of predictability and certainty while simultaneously accommodating any broadening of the literal language of the statute which may be necessitated by resort to its legislative history. 21

3. In the absence of rare and exceptional circumstances, unambiguous statutory terminology must be enforced by the courts. 26

4. The application of the *de minimis* doctrine so as to excise the word "only" from the statute was improper because no rare and exceptional circumstances can possibly exist in light of the narrow scope accorded Congress when it exercises its powers of preemption under the Commerce Clause . . 26

B. The Wisconsin Supreme Court's Holding Ignores The Economic Realities That The Concept Of Nexus Is Intended To Reflect. . 28

1. Congress recognized that the concept of nexus would continue to be defined by the courts. 28

2. The concept of nexus has evolved so as to account for the degree of economic contact that the foreign corporation has with the taxing state. 31

CONCLUSION 35

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No. 91-119

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BRIEF FOR PETITIONER

OPINIONS BELOW

The published decision from which review is sought is reprinted in the appendix to the petition (A 1). *William Wrigley, Jr. Co. v. DOR*, 160 Wis. 2d 53, 465 N.W.2d 800 (1991). In a unanimous decision, the five member Wisconsin Tax Appeals Commission initially upheld Wisconsin's franchise tax assessment against Wrigley (A 218). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶ 202-792 (November 18, 1986). After a procedural remand (A 204), *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 86-CV-6679 and 86-CV-6796, Wis. Tax Rptr. [CCH] ¶ 202-905 (August 20, 1987), the Commission, with one

commissioner dissenting and another not participating, reinstated its original decision (A 163). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Docket No. I-8591, Wis. Tax Rptr. [CCH] ¶ 202-792 (November 25, 1987).

On appeal, the circuit court reversed the Commission's decision reinstating the assessment (A 78). *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, Dane County Circuit Court, Case Nos. 87-CV-7468 and 87-CV-7478, Wis. Tax Rptr. [CCH] ¶ 203-000 (October 19, 1988). In a published decision with one judge dissenting, the Wisconsin Court of Appeals reversed the circuit court, finding that the Commission reached the correct result in upholding the assessment (A 46). *William Wrigley, Jr. Co. v. Wis. DOR*, 153 Wis. 2d 559, 451 N.W.2d 444 (Wis. App. 1989). The Wisconsin Supreme Court, in turn, reversed the court of appeals' decision and voided six years of franchise tax assessments against the respondent (A 1).

JURISDICTION

The judgment from which review is sought was filed on February 19, 1991 (A 1). Pursuant to Supreme Court Rule 30.3, Justice Stevens issued an order granting petitioner an extension of time through July 19, 1991, in which to file a petition for a writ of certiorari. *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, No. A-850 (May 13, 1991). The petition was filed on July 19, 1991. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provision

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have power
>
> . . . .
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

II. Statutory Provisions[1]

Public Law No. 86-272, codified at 15 U.S.C. § 381, provides, in relevant part:

> Minimum Standards
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after . . . [September 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are *sent outside the State for approval* or rejection, *and*, if

[1]The full text of the statutory provisions is printed in the appendix to this brief (PA 1-12).

approved, are *filled by shipping or delivery from a point outside the State*;

(Emphasis supplied.)

Section 71.01(2), Wis. Stats. (1973, 1975, 1977 and 1979–80), provides in relevant part:

> FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation . . . shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year . . . .

STATEMENT OF THE CASE

On October 6, 1980, the Wisconsin Department of Revenue issued a franchise tax assessment against Wrigley for tax years 1973 through 1978 in the total amount of $246,641.04, including interest and penalties (Ex. 1).[2] The assessment was computed using a three-factor

[2]All exhibits and transcripts are located in the administrative record (R. 15).

apportionment formula (payroll[3], property[4], and sales) similar to formulas employed by other states that impose an income or franchise tax on multistate corporations (Ex. E to Ex. 1). Wrigley's Wisconsin sales were used to calculate the numerator of the sales factor, while its total national sales were used to calculate the denominator (Ex. E 3 to Ex. 1):

	Total Sales	Wisconsin Sales	Percentage[5]
1973	$141,549,012	$2,797,055	2.0
1974	$163,849,407	$3,184,703	3.9
1975	$209,559,026	$3,898,041	3.7
1976	$226,853,897	$4,025,372	3.5
1977	$220,047,272	$4,091,568	3.7
1978	$234,182,784	$4,392,202	3.8

[3]The payroll component was computed using total remuneration shown on Wisconsin unemployment tax forms (which ranged from $47,738 in 1973 to $232,731 in 1978) as the numerator and total remuneration shown on federal unemployment tax forms (which ranged from $24,982,112 in 1973 to $43,463,023 in 1978) as the denominator (Ex. E 2 to Ex. 1).

[4]The numerator of the property component, based largely on figures provided by Wrigley (JA 124–25; Ex. 13), was computed using the average value of automobiles, gum, promotional material and displays in the possession of Wrigley's Wisconsin representatives (which ranged from $54,979 in 1973 to $64,385 in 1978) with total property, plant and equipment shown on Wrigley's balance sheet (which ranged from $71,678,820 in 1973 to $92,307,084 in 1978) used as the denominator (Ex. E 1 to Ex. 1).

[5]Under the single factor sales formula approved in *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, *reh. denied*, 439 U.S. 885 (1978), Wisconsin could constitutionally have levied a corporate franchise tax on these percentages of Wrigley's apportionable income.

After aggregating all three factors, franchise tax was levied at the appropriate rate on the following percentages of Wrigley's apportionable income (Exs. A-B and E to Ex. 1):

	Apportionable Income	Taxable Income	Percentage
1973	$11,714,751	$86,663	0.73
1974	$ 8,734,375	$90,185	1.03
1975	$31,862,282	$316,069	0.99
1976	$40,204,964	$379,069	0.94
1977	$33,655,109	$342,429	1.01
1978	$40,931,813	$443,374	1.08

The tax itself ranged from $6,628 in 1973 to $34,806 in 1978, and totalled $129,677 for all six years (Ex. A-B to Ex. 1).

In its administrative appeal, Wrigley did not challenge the Department's computations, but did claim that the assessment was barred by the provisions of § 381 (Ex. 2). A hearing was held before a single commissioner on August 26 (T_1) and August 27(T_2), 1985, at which testimony concerning Wrigley's corporate practices was presented by its tax manager, two resident sales representatives during this period and the two Wisconsin resident regional managers from 1973 through 1978.

Despite its large sales volume, Wrigley voluntarily and intentionally files income or franchise tax returns only in those states where it has real estate, offices, warehouses, manufacturing plants or training facilities, unless it is contacted by a state taxing authority (JA 5-10, 16-17; T_1:25-35, 53-54). Although Wrigley has generally been successful in repelling such contacts through persuasion or by litigation, it continued to file in Alabama after settling that state's claim because there were economic advantages in doing so (JA 7-8; T_1:31).

Wrigley's "activities are basically the same across the United States." (T_1:51). Its domestic advertising ranged from $23,600,000 in 1974 to $39,800,000 in 1978, and included local television, radio and newspaper advertisements in Wisconsin placed by Wrigley's independent advertising agency located in Illinois. (JA 14; T_1:39; Exs. 31-45; Ex. 46.) In states, like Wisconsin, where Wrigley has no land or physical plant, it is not licensed to do business and has no bank accounts or telephone listings within the state (JA 10-12; T_1:35-36). Wrigley owns no trucks, and ships goods almost exclusively by common carrier (JA 11; T_1:35). Product prices are established in and orders generally forwarded for shipment and approval to Illinois, where Wrigley's corporate headquarters is located (JA 3; T_1:26, 51). The only items of property in such states carried on Wrigley's books are station wagons and gum (which is listed as inventory) supplied to its employes (JA 13; T_1:38).

Wrigley, which had from four to six full-time employes residing in Wisconsin during this time period, pays state unemployment taxes on their salaries (JA 11; Ex. E 1:2 to Ex. 1; T_1:35-36). They receive no reimbursement for offices in their homes, but are provided with company-owned station wagons and are reimbursed for automobile maintenance, long distance telephone calls and overnight travel, meals and lodging (JA 14; T_1:38).

Wrigley divides the country into districts, regions and sales territories (T_2:4,36). Wisconsin is part of the Midwestern district, headquartered in Bensonville, Illinois (JA 24, 47; T_1:66; T_2:4-5). Most of Wisconsin is located in the Milwaukee region (T_2:37). One representative is assigned to each territory within a region. (T_2:6).

Representatives are assigned both direct and indirect accounts (JA 26; T_1:68). Direct accounts are wholesalers, vendors and grocery chains that receive large quantities of gum and are therefore eligible for direct billing (JA 26;

T_1:68). Indirect accounts are retailers that are not billed by Wrigley, but purchase stock from wholesalers (JA 26; T_1:68). The representatives were supplied with business cards that listed only the address and telephone number of the district office (JA 24; T_1:66).

A pack of gum retailed for twenty cents in 1978 (Ex. 41). In 1978, Wrigley indicated that at any given time, a sales representative had in his possession display stands with a manufacturing cost of $3,000 as well as gum with an average value of $3,750[6] (JA 124-25; Ex. 13). The amount of this gum which was stale, replaced product could sometimes range as high as forty percent (JA 61; T_2:21-22). A representative generally had 1,500 to 1,800 hundred stick boxes of gum and forty to seventy-five cases containing various numbers of display stands on hand and typically stored such items in both the garage and the basement (JA 28; T_1:70-72). Gum not sold in bags came in five or seven stick packages, with 720 variously-wrapped packages to the case (T_1:70-71).

Each day calls were made, the representative selected thirty to thirty-five displays and the equivalent of six cases of gum with which to call on accounts (JA 35; T_1:86). The displays and gum together filled the entire rear compartment of the station wagon and often the back seat as well (T_2:177). Since most accounts were not direct, the bulk of the representative's time was spent calling on retailers (JA 36; T_1:87). The representative attempted to convince the retailer to accept display stands and to place both new and existing stands in locations that facilitated impulse buying (JA 36-37, 122; T_1:87-88; T_2:179-80). New stands, which were installed daily, were filled by either the retailer or the representative from the retailer's inventory,

[6]In 1985, Wrigley's employes estimated the wholesale value of such gum to average approximately $1,000, but they expressed uncertainty about that figure (JA 29, 61, 121; T_1:71; T_2:21-22, 178).

although it was sometimes necessary to exchange sizes and brands with the retailer in order to do so (JA 43-44, 119; T_1:98; T_2:174-75). Approximately once per month, if that procedure were not feasible and the retailer insisted upon filling a new stand, the representative used his own inventory and gave the retailer an agency stock check as a receipt (JA 44, 120-21; T_1:99; T_2:174-75). Wrigley would then bill the wholesaler who, in turn, would bill the retailer for the goods delivered by the representative (JA 38, 120; T_1:89; T_2:175). The retail value of such transactions did not exceed twenty dollars per occurrence (JA 38, 121-22; T_1:89-90; T_2:179).

Some gum carried by representatives was given away as samples, but most of it was used to replace outdated or damaged product at no cost to the retailer (JA 40-41; T_1:94; T_2:174). Depending on the practice of the particular representative, the stale or damaged gum was shipped by common carrier to Illinois or discarded in local landfills in Wisconsin (JA 39, 118; T_1:92; T_2:172).

Approximately eighty-five percent of a representative's time was spent calling on accounts, while ten percent was spent on general correspondence and five percent preparing reports required by Wrigley (JA 45; T_1:100). In addition to commonplace reports such as expense accounts and itineraries, these items included a monthly inventory reconciliation for the representative's stock of gum and a computerized report form requiring the representative to tally Wrigley's brand distribution at each location, which was forwarded to an independent firm in Illinois for tabulation (T_2:77-78, 122).

The representatives in the Milwaukee region were supervised by a resident regional manager, who spent fifteen to twenty percent of his time on administrative duties such as preparing and reviewing reports (JA 50; T_2:9, 69-73). The regional manager made staffing recommendations, including those relating to hiring and

firing (JA 52-53; T_2:11, 69-73). When hiring became necessary, the regional manager contacted local universities and employment agencies or offices, including job service offices operated by the State of Wisconsin, and would sometimes advertise in local newspapers (JA 53-54, 92-93, 102; T_2:11-13, 109, 126). He would then conduct two or three interviews of prime candidates at local public or private employment agencies or in local hotels or restaurants (JA 53-54, 93; T_2:12-13, 109). The regional manager made the final selection for vacancies, which averaged about one per year, at which point the district manager's approval became necessary (JA 54, 93; T_2:13, 110). Two or three representatives were also fired during this period by the regional manager with the approval of the district manager, including one "rather spontaneous on the spot dismissal" (JA 75, 105-06; T_2:44-45, 136-37).

After being hired, the representative was assigned a sales territory by the regional manager, who had an ongoing responsibility to ensure that such territories remained balanced (JA 81; T_2;59, 60, 132-33). He would occasionally redraw them, subject to the approval of the district manager (JA 82, 111; T_2:60, 162). Since Wrigley did not open its Illinois training center until 1979, it was also the regional manager's responsibility at this time to train new hires (JA 50-51; T_2:9, 15). He did so by assigning up to four representatives to be "trainers" and directing them to leave their own territories and work with the new hire in his territory over a four week period (JA 21-22, 51, 78-79; T_1:63; T_2:9, 52-53).

The regional manager was required to prepare periodic performance appraisals, employe profiles and grading reports and to prepare letters of reprimand when necessary (JA 105, 109-10, 111-12; T_2:53, 136, 144, 162; Exs. 16-27). He was able to do so because he spent a minimum of fifty percent of his time in the field with representatives, an unspecified portion of which was devoted to "supervisory or managerial activities" (JA 81; T_2:57, 134). The remaining

thirty to thirty-five percent of his time was devoted to calling on his own direct accounts and to "territory analysis" (JA 81, 105; T_2:57, 133). Such analysis apparently was necessary in order to prepare reports concerning "the sales of the various Wrigley products in the region" and "provide statistical support regarding field data" (Exs. 7, 9).

Once or twice each year, the regional manager held all-day sales meetings which were usually conducted at a local hotel or motel (JA 55, 90-91; T_2:14-15, 105-06). Some of them were attended by the district manager, who came to Wisconsin about six to nine days each year (JA 99; T_2:116-17).

From 1973 through March of 1976, the regional manager maintained an office in his home for which he claimed federal and Wisconsin income tax deductions (JA 69; T_2:31). It was used to prepare reports, salary descriptions and other items required by Wrigley and contained bulletins, account files, files for each representative and personnel files, some of which were stored in a company-owned filing cabinet (JA 67-69; T_2:29-31). During that period, he also acted as a mediator from two to three times per year when a credit dispute would become particularly difficult (JA 71-72, 69; T_2:34-36).

In 1973, a representative was terminated and his station wagon, gum, displays and other materials placed in storage in warehouse space owned by a local moving company (JA 61-62; T_2:22). In an arrangement approved by Wrigley, the regional manager placed the monthly rental on his expense account and was reimbursed by the company (JA 62, 70-71; T_2:22, 31-32). Once a replacement was hired, the storage of the car ceased, but with Wrigley's permission, he continued to place the storage of the other items on his own expense account because they would not fit in his apartment (JA 62, 71; T_2:23, 32). All of his gum

and displays were, therefore, shipped by Wrigley to the warehouse (JA 70; T_2:32). This arrangement, which was estimated in 1985 to have cost approximately thirty dollars per month, continued through all six tax years (JA 100, 120-21; T_2:118, 176).

The Wisconsin Tax Appeals Commission, using standards promulgated by the Multistate Tax Commission for guidance, held that the following activities were not closely related to solicitation: 1) maintenance of a stock of gum and replacement of stale gum; 2) maintaining product displays with respect to location, design and content; 3) direct gum sales by means of agency stock checks; 4) maintenance of offices in the home by the resident regional managers; 5) conducting training sessions; 6) participation in hiring, firing, training, evaluating and recommending compensation for sales representatives on the part of the regional manager; 7) preparation of periodic sales analyses and reports by the regional manager; 8) involvement in credit transactions by the regional manager for tax years 1973-1975; 9) rental of storage space; and 10) non-incidental advertising (A 249-53).

On judicial review on the record under chapter 227, Wis. Stats., the Dane County Circuit Court held that all of Wrigley's Wisconsin activities constituted "'lesser, included phases' [of solicitation] . . . which Congress intended to . . . protec[t]" (A 140) (citation omitted).

On appeal, the Wisconsin Court of Appeals held that solicitation includes "those generally accepted or customary acts in the industry which lead to the placing of orders" but "not . . . those acts which follow as a natural result of the transaction." *Wrigley*, 451 N.W.2d at 448, 449. Employing this standard, it found that Wrigley was not entitled to claim the limited immunity afforded by the statute: "Wrigley's Wisconsin employees were not just 'missionaries.' They were hirers, firers, meeting organizers, trainers, customer credit 'intervenors' or

'mediators,' renters of warehouse space, stale product replacers, inventory-carriers, display stockers, sellers and billers." *Wrigley*, 451 N.W.2d at 452.

Reversing, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between the buyer and the seller" even when "th[e] orders may be future orders." *Wrigley*, 465 N.W.2d at 809, 811. It determined that factors to be considered in employing this standard include whether the company maintains a warehouse or a stock of goods within the state, the type of business involved, the manner in which orders are solicited and the way products are sold. *Wrigley*, 465 N.W.2d at 812. It also ruled that, in applying these factors, deviations from the norm may be considered *de minimis*, a concept that had also been adopted by the circuit court (A 142). *Wrigley*, 465 N.W.2d at 812. It then held that the provisions of § 381 voided the assessment made under the state statute. *Wrigley*, 465 N.W.2d at 812.

SUMMARY OF ARGUMENT

Section 381 alters the preexisting authority of the states to fairly apportion income derived from sales by foreign corporations within their boundaries. The Wisconsin Supreme Court ignored the fundamental principle that, even after its passage, taxation remained the rule, with solicitation immunity constituting a new, but limited exception. It, therefore, failed to accord unambiguous statutory terms that continued to permit taxation their plain meaning, and to construe any ambiguity in the statute so as to preserve the states' fundamental taxing power to the extent permissible under the language employed by Congress.

The Wisconsin Supreme Court's decision also erroneously focuses upon the presence or absence of physical plant as being determinative of a state's ability to impose an income or franchise tax upon a foreign corporation. It ignores the gradual evolution in the concept of nexus so as to account for a foreign corporation's economic presence within the taxing state. That economic presence, which is reflected in a myriad of supervisory, managerial and other activities engaged in by Wrigley within Wisconsin's boundaries, elevates Wrigley's nexus with Wisconsin beyond the minimal standard defined by § 381. The Wisconsin Supreme Court's decision that § 381 preempts the provisions of section 71.01(2), Wis. Stats., insofar as it imposes a franchise tax on Wrigley for doing business within the state, is therefore erroneous, and should be reversed by this Court.

ARGUMENT

THE WISCONSIN SUPREME COURT INCORRECTLY DETERMINED THAT WISCONSIN'S FRANCHISE TAX STATUTE WAS PREEMPTED BY THE PROVISIONS OF PUB. L. NO. 86-272 ON THE BASIS THAT THE ONLY NEXUS BETWEEN THE WILLIAM WRIGLEY, JR. CO. AND THE STATE OF WISCONSIN CONSISTED OF THE SOLICITATION OF ORDERS FOR APPROVAL AND DELIVERY FROM A POINT OUTSIDE THE STATE.

A. The Wisconsin Supreme Court's Decision Fails to Construe § 381 In A Manner Consistent With The Court's Decisions Concerning Commerce Clause Preemption.

1. In exercising its powers under the Commerce Clause, Congress is presumed not to have significantly altered the preexisting authority of the states unless it uses unmistakable language to do so.

In *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450, 454 (1959), the Court held that due process permits the imposition of a fairly apportioned tax where a foreign corporation engages in "a regular and systematic course of solicitation of orders for the sale of its products." Nexus was found to exist because the "corporations engage[d] in substantial income-producing activity in the taxing States." *Id.*, at 465. The Court also held that such taxes did not violate the Commerce Clause, distinguishing between "an invalid direct levy which placed a burden on interstate commerce and a charge by way of net income derived from profits from interstate commerce." *Id.*, at 459.

Responding to pointed dissents by Justice Whittaker and Justice Frankfurter, Justice Harlan explained that "past decisions of this Court clearly point to, if indeed they do not compel, the sustaining of these two state taxing measures." *Id.*, at 465 (Harlan, J., concurring). Nevertheless, as the Court later recognized, the decision triggered a swift lobbying effort from business interests which culminated in the passage of § 381:[7]

> The impetus behind the enactment of § 381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 359 U.S., at 452, 79 S.Ct., at 359. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub.L. 86-272, 73 Stat. 555, 15 U.S.C. § 381 [15 U.S.C.S. § 381], within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the

[7]The bill has been described as "a piece of hasty, hysteria legislation . . . pressured through the Congress by a highly organized and certainly skillfully handled group of trade organizations." Roland, *State Taxation of Interstate Income: A State Tax Administrator's Viewpoint*, 12 The Tax Executive 35, 35 (1959).

> situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal.*

Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275, 279-80 (1972) (footnotes omitted; emphasis supplied).

"The power of taxation is fundamental to the very existence of the government of the states." *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 537 (1931). And, as Justice Harlan explained in *Portland Cement*, the states' authority to impose fairly apportioned taxes on foreign corporations with employes continuously and systematically doing business within their boundaries had previously been upheld. *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946) (per curiam). *Also see, e.g., Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

When Congress chooses to alter such preexisting, fundamental powers of the states, it must do so clearly and unambiguously:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242[, 105 S. Ct. 3142, 3147, 87 L.Ed. 2d 171] (1985); *see also Pennhurst State School and Hospital v. Halderman*, 465 U. S. 89, 99[, 104 S. Ct. 900, 907, 79 L.Ed. 2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention

> "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230[, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447] (1947) . . . .

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). *Also see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 2281 (1989). Thus, where Congressional preemption of state regulatory activity in the exercise of its Commerce Clause powers is less than clear, it will not be implied. *See generally, Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.33 (1986).

These principles of statutory construction have already been applied by the Court to § 381: "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.'" *Heublein*, 409 U.S. at 282-83, *quoting United States v. Bass*, 404 U.S. 336, 349 (1971). They were not, however, taken into consideration by the Wisconsin Supreme Court or by any other state court that has had occasion to construe the provisions of § 381.

2. A uniform pre-sale/post-sale standard for determining solicitation immunity accommodates Congress' objectives of predictability and certainty in making nexus determinations while simultaneously preserving the states' preexisting taxing authority to the extent permissible under the language employed by Congress in § 381.

a. The statute contains no industry-specific standard.

Most litigation in the state courts under § 381 has centered around the meaning of the term "solicitation":

> [C]ourts have adopted one of three successively more inclusive definitions of "solicitation": (1) the specific act of asking a customer to purchase one's product . . . [8]; (2) any act which *leads to* the purchase of one's product as opposed to acts which *follow from* the purchase . . . [9]; and (3) any act which *leads to* or *follows from* the purchase so long as said act is *incidental* to the purchase . . . [10].

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[8]Decisions of state courts of last resort which have employed the narrowest of the three definitions include *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W.2d 557 (1971) and *Clairol, Incorporated v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972).

[9]Decisions of state courts of last resort which have employed definitions no broader than this intermediate standard include *Drackett Products Co. v. Conrad*, 370 N.W.2d 723 (N.D. 1985); *Sjong v. State, Dept. of Revenue*, 622 P.2d 967 (Alaska 1981), *appeal dismissed*, 454 U.S. 1131 (1982); *Jantzen, Inc. v. District of Columbia*, 395 A.2d 29 (D.C. App. 1978); *Miles Laboratories, Inc. v Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1976); and *Chattanooga Glass* itself. *Also see Matthew Bender & Co. v. Comptroller*, 67 Md. App. 693, 509 A.2d 702 (1986); *Consolidated Accessories Corp. v. Franchise Tax Board*, 161 Cal. App. 3d 1036, 208 Cal. Rptr. 74 (1984); *National Tires, Inc. v. Lindley*, 68 Ohio App.2d 71, 426 N.E.2d 793 (1980).

[10]Decisions of state courts of last resort which have adopted the broadest of these three standards include *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 Ind. 378, 416 N.E.2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm*, 579 P.2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978); *Gillette Company v. State Tax Commission*, 56 A.D.2d 475, 393 N.Y.S.2d 186 (1977), *aff'd*, 45 N.Y.2d 455, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978); *Coors Porcelain Company v. State*, 183 Colo. 325, 517 P.2d 838 (1973), *cert. denied*, 419 U.S. 874 (1974); *State v. State Tax Commission*, 382 S.W.2d 645 (Mo. 1964); and *Smith Kline &*

(continued...)

Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599, 600-01 (1979) (emphasis supplied; citations omitted).

The Wisconsin Supreme Court sided with the minority of jurisdictions that have expansively construed the statute. It also held that, in delineating those activities encompassed by the term "solicitation," an appropriate reference point is "the type of business involved." *Wrigley*, 465 N.W.2d at 812. This industry-specific aspect of the standard, which was also accepted by the court of appeals below, originates in the Oregon courts. *See Miles Laboratories*, 546 P.2d at 1083, *quoting Olympia Brewing Co. v. Department of Revenue*, 5 Or. T.R. 99, 110 (1972), *aff'd*, 266 Or. 309, 511 P.2d 837 (1973), *cert. denied*, 415 U.S. 976 (1974). Since many state courts rely upon the substantial body of law Oregon has developed in this area, it has gained some acceptance without critical examination. It should be recognized, however, that *Olympia Brewing* itself holds that "many businesses, by their very nature, cannot claim the benefits of the federal statute." *Id.*, 5 Or. T.R. at 110. Given this language, it is doubtful that the Oregon courts have adopted an industry-specific standard in the sense urged by Wrigley.

There is no mention of any industry-specific standard in § 381. The Wisconsin Supreme Court's acceptance of Wrigley's claim that the chewing gum industry is unique and therefore must operate in a certain fashion effectively allows Wrigley to determine its own immunity from taxation because Wrigley *is* the industry.

In 1987, for example, Wrigley occupied fifty percent of the entire chewing gum market, while twenty-eight percent was held by American Chicle and twenty percent

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[10](...continued)
French Laboratories v. State Tax Com'n, 241 Or. 50, 403 P.2d 375 (1965) (since repudiated).

by Nabisco,[11] leaving only two percent of the market for the "small-and medium-sized businesses" that § 381 was intended to protect. S. Rep. No. 658, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2551. It would truly be ironic if the largest business in an industry of large businesses could determine its own immunity from state taxation under such a statute.

In exercising its powers under the Commerce Clause, Congress did not clearly delegate the authority to entire industries to influence immunity under the statute. There is therefore no warrant for the industry-specific statutory construction advocated below by Wrigley.

b. The pre-sale/post-sale standard preserves Congress' goal of predictability and certainty while simultaneously accommodating any broadening of the literal language of the statute which may be necessitated by resort to its legislative history.

Since "Congressmen typically vote on the language of a bill" the ordinary meaning of the words used should be determinative of a statute's meaning. *United States v. Locke*, 471 U.S. 84, 95 (1985). As the Wisconsin Supreme Court recognized, the ordinary meaning of the term "solicit" is to ask for something. *Wrigley*, 465 N.W.2d at 809. The Arkansas and New Jersey courts apply that ordinary meaning when determining immunity under § 381 and therefore do not permit any activity other than requesting the customer to purchase the product. Although that construction of the statute is acceptable to Wisconsin, the assessment in this case was based on the pre-sale/post-sale standard developed by the Oregon courts (Ex. B).

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[11]*The Los Angeles Times* (April 15, 1987).

Deviation from the ordinary and accepted meaning of terms in a statute is permissible only if resort to its legislative history is required. But, "'[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is "a step to be taken cautiously" even under the best of circumstances.'" *Locke*, 471 U.S. at 95-96 (citations omitted). Given the rules of construction applicable to preemptive Commerce Clause statutes, resort to legislative history may not even be required. If such resort is permissible, it is only to search for "clearly expressed legislative intention to the contrary." *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The views of Senator Byrd, the sponsor of the bill, reveal no conclusive intent to define "solicitation" in a manner contrary to its ordinary and accepted meaning:

> Mr. President, all in the world the bill would do is to say that business which originates from the solicitation of a *traveling salesman, who does not have an office* and who does not have any facilities whatever, except perahaps (sic) his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. That is all the bill would do. It has been stripped down to the point that that is *the only thing the bill would do.*
>
> . . . .
>
> Let me say a word about small business. The Senator from Alabama is interested in the protection of small business. Big business can get orders by advertising over the television and in the newspapers. Big business concerns spend millions of dollars advertising on the television and in newspapers. Frequently the small businessman must send a salesman in to get the business.
>
> What about the orders which are obtained by mail order houses? Should such transactions be taxed? The mail order houses send a booklet into the State, and the recipient notes from that book what he wants to buy. *All that the small businesses can do is to send in salesmen. They have no office. They do no business in the State, except to solicit orders.*

105 Cong. Rec. 16493-16494 (1959) (emphasis supplied).

The Senate Committee report appears to define "mere solicitation" with respect to the "Brown-Forman case." S. Rep. No. 658, 86th Cong., 1st Sess. *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548 (footnote omitted).

Although *Portland Cement* may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. In each instance, a state court decision had extended the reasoning in *Portland Cement* so as to permit the imposition of state income tax on out-of-state corporations even though those corporations only employed non-resident "drummers" or "missionary men" and did not maintain any physical facilities within the taxing state. *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959); *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). In *Brown-Forman*, 101 So.2d at 70, the taxpayer employed "missionary men" who "neither solicit nor accept orders from the retail dealers." They called on wholesalers and sometimes assisted wholesalers' salesmen in attempting to obtain suitable displays in retail establishments. In

International Shoe, 107 So.2d at 640, the taxpayer apparently employed "drummers" since it operated "all of its business outside of the State of Louisiana." It engaged in the "systematic solicitation of orders for its product by fifteen salesmen." *Id.*

It is "generally believed" that § 381 did not overrule the result reached in *Portland Cement*. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law* 86-272, 38 Tax Lawyer 293, 302 (1985). Although it may have intended to reverse the results reached in *Brown-Forman* and *Fontenot*, there is no evidence of any post-sale activity in either of those cases. Certainly, neither of them involved a stock of goods within the state like that used by Wrigley's representatives.

Senator Sparkman, the sponsor of S.J. Res. No. 113, a bill that limited the states' authority to tax to a greater degree than did S. 2524 made the following remarks about that device:

> Senator TALMADGE. You could put the words "stock of goods other than for the purposes of demonstrating samples," and that would cover it insofar as the stock of goods situation is concerned.
>
> Senator SPARKMAN. Well, that could be done. I should think that ordinarily the term "stock of goods" would not include samples from which orders will be taken. But the minute you start selling those goods off the shelves, why then, I think the nature of the goods changes, the operations change.

Hearings Before The Committee On Finance, U.S. Senate, 86th Cong., 1st Sess. 92 (July 21, 1959). As the court of appeals explained below, the other activities engaged in by Wrigley's sales representatives were even farther removed

from the act of requesting the customer to purchase the product.

The pre-sale/post-sale standard also provides a clear line of demarcation permitting such activities as the use of samples and product demonstrations. It therefore creates certainty on behalf of both the taxpayer and the taxing authority. The Wisconsin Supreme Court's post-sale "incidental activity" standard does not. That court freely acknowledged that the "pre-sale/post-sale test may produce consistency and predictability." *Wrigley*, 465 N.W.2d at 809. Yet, it held that any activity whose purpose is "encouraging future orders" constitutes "solicitation." *Id.* That standard effectively immunizes any business activity engaged in by Wrigley, since the only business in which it is engaged is the manufacturing of gum to be sold in retail establishments. Every action taken by Wrigley is presumably calculated to enhance that goal.

The commentators have criticized such an expansive solicitation standard not only as being unworkable, but also as creating a competitive disadvantage to intrastate domestic business. Note, *Public Law* 86-272: *Legislative Ambiguities and Judicial Difficulties*, 27 Vand. L. Rev. 313, 340 (1974); *Federal Limitations* § 9:14, at 517-18. For policy reasons alone, it should not be accepted by this Court.

The central theme that permeates the Wisconsin Supreme Court's decision is that immunity is the rule and taxation the exception. That statutory construct alters the preexisting powers of the states to a degree not supported by clearly expressed textual language. It is inconsistent with the principles of federalism articulated in *Heublein* and therefore should not be allowed to stand.

3. In the absence of rare and exceptional circumstances, unambiguous statutory terminology must be enforced by the courts.

If federal statutory language is clear, it is ordinarily conclusive. *United States v. Clark*, 454 U.S. 555, 560 (1982). If rare and exceptional circumstances are not present, judicial inquiry is therefore complete when particular terms in a statute are unambiguous. *Demarest v. Manspeaker*, __ U.S. __, 111 S. Ct. 599, 604 (1991). In such situations, inquiry into legislative history becomes "irrelevant." *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). A court's sole obligation is then to enforce the unambiguous statutory terms. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026, 1030 (1989).

The Wisconsin Supreme Court failed to identify any rare and exceptional circumstances entitling it to ignore the unambiguous term "only." Only by doing so can a *de minimis* standard be applied.

4. The application of the *de minimis* doctrine so as to excise the word "only" from the statute was improper because no rare and exceptional circumstances can possibly exist in light of the narrow scope accorded Congress when it exercises its powers of preemption under the Commerce Clause.

Since any ambiguity in a statute preempting the fundamental powers of the states must be construed in favor of the retention of such power, unambiguous statutory language *preserving* such powers must necessarily be conclusive. There is no doubt that the statutory terminology is unambiguous: "Public Law 86-272 provides for no 'exceptions' to the statutory

requirements that there must be *only solicitation of orders* before an exemption from taxation will be granted." P. Hartman, *Federal Limitations on State and Local Taxation* § 9:12, at 507.

Heublein, 409 U.S. at 278–79, is therefore fatal to Wrigley because the Court there held that the transfer of products within the State "clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381(a)(1)." Similarly, the agency stock check procedure periodically employed by Wrigley involved delivery to a retailer from a stock of goods within Wisconsin in contravention of the explicit language of § 381.

Wrigley's credit mediation and warehouse rental activities also are hardly commonly understood forms of solicitation. In order to hurdle these and other problems surrounding Wrigley's actual conduct in this case, the Wisconsin Supreme Court effectively held that compliance with the statute is excused unless *non*compliance is "of sufficient weight in the flow on interstate commerce." *Wrigley*, 465 N.W.2d at 811.

Not only does that holding excise the word "only" from the statute, it also inverts its entire premise. The statute *permits* taxation unless the taxpayer's "only" activities involve a specified manner of "solicitation" and "delivery." The Wisconsin Supreme Court's holding *prohibits* taxation unless the taxpayer engages in a requisite, but entirely unspecified, quantum of those two activities. Such a *de minimis* standard hardly promotes clarity or removes uncertainty, since its bounds can never be ascertained in advance by either the taxpayer or the state taxing authority.

This *de minimis* doctrine also fails to address the fact that the entire issue in *Portland Cement* revolved around the question of nexus. While an isolated incursion into a

state may not create nexus sufficient to justify taxation of a foreign corporation, the systematic exploitation of a domestic market by such a corporation is precisely the kind of activity that warrants the imposition of a fairly apportioned tax. In contrast, a *de minimis* doctrine improperly permits a foreign corporation to measure any claimed violation of the requirements of the statute against its success in exploiting the domestic market. The *greater* that success, which would normally *increase* the justification for the imposition of a fairly apportioned tax, the *more* tenable a *de minimis* claim will be.

B. The Wisconsin Supreme Court's Holding Ignores The Economic Realities That The Concept Of Nexus Is Intended To Reflect.

1. Congress recognized that the concept of nexus would continue to be defined by the courts.

Even after the passage of § 381, a vast continuum of nexus determinations remained the province of the courts. In *Heublein*, 409 U.S. at 280, the Court recognized that the focal point of Congress' concern in § 381 involved the question of nexus. But Congress recognized that an entire range of business activity between "mere solicitation" and other forms of activity that had already been recognized by the courts as creating nexus remained subject to judicial review:

> Whether business activities other than those described in the bill constitute a sufficient basis for the imposition by a State or political subdivision thereof of a net income tax on income derived from interstate commerce is left for future determination by the Congress, or in the absence of congressional action, by the courts.

S. Rep. No. 658, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2524. Senator Byrd, the floor manager of S. 2524 also had the following colloquy with Senator Javits which reinforces the language contained in the Senate Report:

> MR. JAVITS: Is it the theory of this measure that it is a bracket--in other words, that, on the one hand, it prevents taxation when there is just order-taking, without order acceptance, and on the other hand, taxation is permitted when there is a corporation, incorporated under the laws of a State, or an individual who is domiciled in that State, and that in between, the various questions or the range of questions are still left to court adjudication, as in the present way?
>
> . . . .
>
> MR. JAVITS: Is that the theory of this proposed legislation?
>
> MR. BYRD of Virginia: Yes.

105 Cong. Rec. 17834 (1959).

Nexus jurisprudence has undergone a considerable evolution under both the Commerce Clause and the Due Process Clause since the Court's decision in *Portland Cement*. A tax does not violate the Commerce Clause if it 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services the state provides. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *Complete Auto* overruled a line of cases culminating in *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), which had adhered to the principle that a direct tax on interstate commerce is unconstitutional, a view expressed in the

Senate debates by many of the proponents of § 381 as justification for its passage. *See, e.g.*, 105 Cong. Rec. 16475 (1959) (remarks of Senator Cooper).

The concept of nexus under the Due Process Clause has undergone a parallel transformation. It has long been held that a tax does not violate the Due Process Clause if there is 1) a "minimal connection" or nexus between the interstate activities and the taxing state, and 2) a "rational relationship" between income attributed to the state and intrastate values of the enterprise. *Trinova Corp. v. Michigan Dept. of Treasury*, __ U.S. __, 111 S. Ct. 818, 828 (1991). Under traditional due process doctrine nexus was found to exist where a state afforded protection to property through such means as fire and police services. *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). *See State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 216 (N.D. 1991), *cert. granted*, No. 91-280.

Under the Commerce Clause, a "wide range of benefits" including the "advantages of a civilized society" now satisfies the requirement that the tax fairly relate to benefits the state provides. *Goldberg v. Sweet*, 488 U.S. 252, 257 (1989). And under the Due Process Clause, a myriad of items, such as the advantages of a civilized society and other intangible factors including a trained work force have been determined to be sufficient to satisfy the nexus requirement. *See, e.g., Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 228 (1980).

Due process and Commerce Clause nexus doctrines have evolved so as to establish a "'consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax.'" *Trinova*, 111 S. Ct. at 828, *quoting Mobil Oil Corp. v. Com'r of Taxes of Vermont*, 445 U.S. 425, 443 (1980). Where nexus is in issue, modern decisions have therefore looked to the economic realities of the asserted basis for taxation: "[I]n actuality the homes of these officials were used as corporate offices. Despite their label

as 'homes' they served the corporation just as effectively as 'offices.'" *General Motors Corporation v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Indus. v. Wash. State Dept. of Rev.*, 483 U.S. 232 (1987).

Economic considerations are therefore fundamental to any determination as to whether nexus exists.

2. The concept of nexus has evolved so as to account for the degree of economic contact that the foreign corporation has with the taxing state.

In its response to the petition at 6, Wrigley concedes that, but for § 381, "a 'nexus' sufficient to pass constitutional muster otherwise may exist." But Wrigley conveniently fails to mention and the Wisconsin Supreme Court apparently was unwilling to consider that there is not simply minimal nexus here, but rather "'nexus' aplenty." *Compare D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988). Such nexus necessarily results from Wrigley's massive economic presence in Wisconsin. *Compare Quill*, 474 N.W.2d at 211.

Since its founding in 1890, Wrigley has almost always been the largest manufacturer of chewing gum in the world.[12] Its worldwide sales now exceed one billion dollars.[13] It commands more than one half of the entire chewing gum market.[14] It is one of the top fifty domestic food and beverage manufacturers in terms of sales and one

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[12]*The Economist* (June 9, 1990); *The New York Times* (December 27, 1980).

[13]*The San Francisco Chronicle* (January 31, 1991).

[14]*Investor's Daily* (January 5, 1990).

of the top one hundred domestic advertisers, with annual spending of approximately $125 million.[15]

It is precisely because Wrigley is the goliath of the chewing gum industry that it has been forced to assign duties other than "mere solicitation" to its employes in Wisconsin. As was true in *General Motors*, the economic reality in this case is that its regional managers had offices in Wisconsin. Indeed, the appellation "manager" itself belies any claim that such persons engage *only* in solicitation.

Wrigley's representatives also are unlike classic "missionary men" or even "drummers" who carried samples with them from place to place. Only a small fraction of a Wrigley representative's gum and display stands are not in storage at any given time. The economic reality is that the remainder constitutes a stock of goods in storage in Wisconsin just as surely as it would have had it been placed in a warehouse. Moreover, even under earlier concepts of nexus, property-protection services were provided to Wrigley in connection with those items that actually were stored in a warehouse. A civilized society provides such services, regardless of the size or quantity of product in storage. Wrigley's regional manager recognized as much when he chose to store a car at that location: "One thing you wanted to do, you wanted to make sure it was stored in a safe location, and it was protected. And that was the main consideration" (T_2:23). He also recognized that, in economic reality, a training center was being operated by Wrigley in Wisconsin: "We did not have a training center like we do now, so the basic responsibility to see that a new hire was property trained was in the hands of the regional manager" (T_2:9).

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[15] *Prepared Foods* (July, 1990); *Advertising Age* (September 26, 1990).

Not only did Wisconsin afford Wrigley the advantages of a trained work force, it also provided the taxpayer-financed wherewithal to skim the cream of that force through its state employment offices and universities. The same kinds of subsidies result from the state tax deduction taken by the first of Wrigley's regional managers and from Wrigley's use of Wisconsin landfills. *Compare Quill*, 470 N.W.2d at 218. The decision below means that, far from being able to "ask return," *J.C. Penney*, 311 U.S. at 444, Wisconsin will continue to subsidize Wrigley in its exploitation of Wisconsin's consumer market.

The evolution of the decisional law concerning nexus to reflect the substantive economic presence of the foreign corporation in the taxing state demonstrates why Wrigley's presence in Wisconsin far exceeds the "minimal standard" which Congress sought to establish. 105 Cong. Rec. 17771 (1959) (statement of Representative Celler). To hold otherwise would result in the expansive interpretation of a statute which embodies a vestigial legal doctrine:

> Pub. L. No. 86-272 prevents, *inter alia*, a state from imposing a net income tax on the income derived within its borders by a person whose only activities are the solicitation of orders. In today's economy, an out-of-state corporation can achieve substantial market penetration and still qualify for Pub. L. No. 86-272's exemption by soliciting through the use of radio, television, telephone, and the mail; the statute thus appears to embody an antiquated concept of tax jurisdiction. . . .
>
> . . . Over time, technological developments will make the antediluvian approach of Pub. L. No. 86-272 increasingly obvious. For similar reasons, *National Bella Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), needs re-examination.

Pomp, *State Tax Reform For The Eighties: The New York Tax Study Commission*, 16 Conn. L. Rev. 925, 927-28 n.8 (1984).

The Wisconsin Supreme Court appears to have been under the assumption that its nexus determination involved the selection of one of two alternatives: solicitation immunity or the existence of nexus resulting from the presence of real estate or physical plant. Although Wrigley has no real estate or physical plant in the state, its economic presence and concomitant activities within Wisconsin indicate that it has nexus well beyond "mere solicitation."

That economic presence, as evidenced by those activities, elevates this particular nexus determination to a level within the range of judicial decision-making which Congress acknowledged that it had left untouched. Once it is determined that a finding of nexus is permissible under § 381, it inevitably must be made.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed, the franchise tax assessment reinstated, and the cause remanded to the Wisconsin Supreme Court for further proceedings consistent with this Court's opinion.

Dated this 21st day of November, 1991.

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No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

APPENDIX TO BRIEF FOR PETITIONER

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An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I - IMPOSITION OF MINIMUM STANDARD

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section --

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed --

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

TITLE II -- STUDY AND REPORT BY CONGRESSIONAL COMMITTEES

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 302. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.

Approved September 14, 1959.

Section 71.02, Wis. Stats (1973)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2am). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations (including any division or agency of any such society, organization or corporation) operating plans of sickness care under ch. 148, hospital service under s. 182.032, dental care under s. 447.13, prepaid prescription plans under s. 450.13, or prepaid optometric service plans under s. 449.15, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the context clearly requires otherwise. The tax imposed upon societies, organizations or corporations (including any division or agency of any such society, organization or corporation) operating plans of sickness care under ch. 148, hospital service under s. 182.032, dental care under s. 447.13, prepaid prescription plans under s. 450.13, or prepaid

optometric service plans under s. 449.15, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1975)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2am), (2k) and (2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the context clearly requires otherwise. The

tax imposed upon societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1977)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance companies subject to taxation under this chapter unless the

context clearly requires otherwise. The tax imposed upon societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be upon such net income as is determined by application to such companies of those provisions of the internal revenue code applicable to mutual insurance companies, other than life insurance companies or mutual marine insurance companies, having total receipts over $500,000 subject to any applicable addition or subtraction as provided in sub. (4)(a).

Section 71.02, Wis. Stats (1979-80)

FRANCHISE TAX ON CORPORATIONS. For the privilege of exercising its franchise or doing business in this state in a corporate capacity every domestic or foreign corporation, except corporations specified in sub. (3), shall annually pay a franchise tax according to or measured by its entire net income of the preceding income year at the rates set forth in s. 71.09(2m). Every corporation organized under the laws of this state shall be deemed to be residing within this state for the purposes of this franchise tax. All provisions of chs. 71 and 73 relating to net income taxation of corporations shall apply to franchise taxes imposed under this subsection, unless the context requires otherwise. The tax imposed by this subsection on national banking associations shall be in lieu of all taxes imposed by this state on national banking associations to the extent it is not permissible to tax such associations under federal law. The tax imposed by this subsection on insurance companies subject to taxation under this chapter, except societies, organizations or corporations under ch. 613 operating by virtue of s. 148.03, 447.13, 449.15, 450.13 or 613.80, shall be based on net income computed under sub. (4), and no other provision of this chapter relating to computation of taxable income for other corporations shall apply to such insurance companies. All other provisions of this chapter shall apply to insurance

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S. 2524

IN THE SENATE OF THE UNITED STATES

August 11, 1959

Mr. Byrd of Virginia, from the Committee on Finance, reported the following bill; which was read twice and placed on the calendar

A BILL

Relating to the power of the States to impose net income taxes on income derived from interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) no State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business 2activities within such State by or on behalf of such person during such taxable year are any, or all, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State;

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective client or customer of such person, if orders by such client or customer to such person to enable such client or customer to fill orders

resulting from such solicitation are orders described in paragraph (1); and

(3) the maintenance and operation by such person, or by his representative, in such State of an office the primary purpose and use of which is to serve representatives of such person who are engaged in the solicitation of orders described in paragraph (1) or (2), or both, and to receive, process, and forward such orders.

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to --

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors.

(d) For purposes of this section --

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

SEC. 2. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by the first section of this Act.

(b) The provisions of subsection (a) shall not be construed --

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

SEC. 3. For purposes of this Act, the term "net income tax" means any tax imposed on, or measured by, net income.

SEC. 4. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

[redacted]

[redacted]

[redacted]

Petitioner,

v.

[redacted]

Respondent.

On Writ of Certiorari to the
[redacted]

BRIEF FOR RESPONDENT

E. Barrett Prettyman, Jr.*
[redacted]
Columbia Square
[redacted]
Washington, D.C. 20004-1109
([redacted]) [redacted]

[redacted]

[redacted]

[

QUESTION PRESENTED

Does 15 U.S.C. § 381, which prohibits a State from taxing foreign corporations whose only activities within the State are the solicitation of orders, bar the assessment and collection of Wisconsin franchise tax from respondent for the years 1973-1978?

The Wisconsin Supreme Court answered this question in the affirmative.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The Respondent, Wm. Wrigley Jr. Company, is a corporation. Respondent has no parent companies or subsidiaries (except wholly owned subsidiaries) to list pursuant to Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-119

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,
v.
WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

The issue in this case is whether the Wisconsin Supreme Court properly applied a statute, 15 U.S.C. § 381, to the activities of the Respondent William Wrigley, Jr. Company [1] ("Wrigley") in Wisconsin during the years 1973 through 1978. The outcome in this case, as in each case arising under this statute, is dependent upon its unique facts and circumstances.[2] Thus, applying the stat-

[1] We have used here the title of the company as it appears in the caption of the case. The company's correct name, however, is "Wm. Wrigley Jr. Company."

[2] Despite the conflict alleged to exist among various tribunals regarding the proper interpretation of Section 381, no court faced with the precise mix of activities in which Wrigley engaged in Wisconsin has held them to exceed the scope of the statute. To the contrary, as the Wisconsin Supreme Court pointed out below, in

ute in this case necessarily requires a careful review of the facts.

In its Statement of the Case, petitioner, the Wisconsin Department of Revenue, gives a highly selective summary of the factual and procedural background of this case. For example, it essentially adopts the description of Wrigley's activities as set forth by the Wisconsin Tax Appeals Commission ("TAC"), while wholly ignoring the fact that the Wisconsin Supreme Court disavowed many of TAC's findings.[3] As a result, petitioner has mischaracterized part of the factual and procedural background of this case and has exaggerated the significance of a few elements in disregard for the totality of circumstances.

Factual Background

Wrigley is a Delaware corporation with its commercial domicile and principal place of business in Illinois. The company manufactures various chewing gum products and sells them to wholesalers and retailers across the nation. JA 3, 47-49.[4]

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the one case where precisely the same kind of activities were at issue, the outcome was the same as here. *In the Matter of the Petition of William Wrigley, Jr. Company*, slip op. (N.Y. Tax Comm'n, Mar. 11, 1987), a copy of which is appended to Wrigley's Brief in Opposition to Petition for Writ of Certiorari at a.3.

[3] The *amici curiae* supporting petitioner also disregard the Wisconsin Supreme Court's interpretation of the factual record, preferring instead to rely on TAC's findings. *See, e.g.*, Brief Amicus Curiae of the Multistate Tax Commission in Support of Petitioner ("MTC Br.") at 22-23; Amicus Curiae Brief of the City of New York in Support of Wisconsin Department of Revenue ("NYC Br.") at 15.

[4] For ease of reference, we use the same designations to the record that petitioner uses. T1 refers to the first day of trial testimony; "A" to the appendix to the petition for certiorari; "a." to the appendix to the opposition to the petition for certiorari; "JA" to the Joint Appendix filed with this Court; and "R." to the Record as lodged in the Wisconsin Supreme Court and in this Court.

Wrigley's sales efforts in Wisconsin conform to the dictates of Section 381 ("orders [must be] * * * sent outside the state for approval or rejection, and * * * filled by shipment or delivery from a point outside the State"). Wrigley's Wisconsin sales operation is and always has been conducted out of its suburban Chicago office. All Wisconsin orders were approved in Chicago and shipped back by common carrier. JA 10-11, 95-96. All credit and collection activities were handled by Wrigley's credit department in Chicago. JA 25, 71-72, 96-97. (The evidence showed that Wrigley's Wisconsin regional sales manager from 1973 to 1975 voluntarily intervened two or three times per year in credit disputes, but only in order to cultivate the account and protect future sales; at no time did he seek payment from the customer. JA 71-73.)

Wrigley kept its presence in Wisconsin to a minimum. It was not licensed to do business there. It did not own or lease any real estate there; it did not open a bank account there; nor did it own or operate a manufacturing or warehousing facility in the State. Neither Wrigley nor its sales representatives maintained any office in Wisconsin. JA 10-13, 94. When the Wrigley sales manager from 1973 to 1976 kept a file cabinet and a desk in a corner of his basement, where he prepared and kept reports to the company, Wrigley did not even reimburse him for the use of his home. JA 12, 67-69.

Wrigley's only presence in Wisconsin during the years in question was through its resident sales force, which was made up of a regional sales manager, who resided in Wisconsin, and four sales representatives, each of whom was responsible for a geographic territory within the State. (In one year, 1976, Wrigley employed five sales representatives.) JA 47-48, 86-87. Wrigley's Wisconsin sales representatives devoted virtually all of their time to the solicitation of orders from wholesale and retail sellers of chewing gum. JA 35, 42-43, 89-90.

Neither Wrigley nor any member of its sales force was listed in a Wisconsin telephone directory. In fact, the business card carried by Wrigley's Wisconsin sales force contained the representative's name but listed the address and phone number of Wrigley's district sales office in Illinois. JA 12, 24. Even Wrigley's Wisconsin advertising was contracted for by an independent agency located in Chicago. JA 14.

Wrigley's strategy for soliciting orders for its products takes into account the realities of the chewing gum business. Consumers buy chewing gum almost exclusively on impulse; seldom is the purchase planned in advance. Thus, for Wrigley to generate orders from wholesalers and retailers, its products must be displayed in such a way that they are highly visible and readily available to the ultimate consumer at locations such as check-out counters. JA 30-31, 57. Further, chewing gum has a limited shelf life; it loses its flavors and texture unless sold and used within approximately six months of manufacture. JA 57-58, 117. Keeping a supply of fresh gum on hand is therefore as important to maintaining consumer demand and generating new orders as are any other marketing tools available to the company. These two factors—the impulse nature of most purchases and the short shelf life of the product—are of unique concern in the marketing of confectionary items such as chewing gum and are crucial to the way in which Wrigley organizes its solicitation activities.

Typically, Wrigley's sales representatives spent their days making presentations designed to convince an account to accept a promotional offering or to take on a new brand or packaging, JA 26-27, 88, or surveying how the various Wrigley flavors and packages were displayed and checking them for freshness. JA 27-28, 116-117. If an account's supply of gum was stale, the representative would replace the stale packages with fresh ones at no charge. On rare occasions, a sales representative might

fill a retailer's counter-top display case from the supply of gum he kept on hand primarily for samples and for exchange of stale gum. He would report the transaction to Wrigley on an "agency stock check," the form used to account internally for the representative's supply of sample/replacement product. JA 28, 43-44, 61, 119-120; T1 97.[3] The amount of product involved in these "agency stock checks" was miniscule—estimated at 0.00007 of one percent of Wrigley's total Wisconsin sales in 1978. A 43. The Wisconsin Supreme Court found that these agency stock checks were not sales, inasmuch as the representatives never negotiated a price, never billed an account, and never accepted money for gum. A 43; JA 37-38, 119-120.

Although an effort has been made to mischaracterize him as a business manager with duties unrelated to sales, the regional sales manager was the most important member of Wrigley's sales team, with direct sales responsibilities. He was responsible for soliciting orders from "key" accounts (major accounts responsible for 80% of Wrigley's total sales volume), and spent 80-95% of his time in the field. JA 49-50, 87-90. A portion of his remaining time was devoted to such sales-oriented activities as group meetings to strategize sales of new products or packaging, or the communication of company sales policy to representatives. JA 90-91.

As a necessary incident to the deployment of an interstate sales force, Wrigley engages in personnel-related activities. These personnel activities were centered in Chicago. The Chicago district manager bore responsibility for all district personnel decisions, including the hiring, termination, promotion and salary of Wisconsin sales representatives. The regional sales manager in Wisconsin simply carried out the operational tasks of interviewing

[3] The record shows that the value of a sales representative's on-hand supply was minimal—approximately $700 to $1,000. JA 29, 61, 110, 121. Moreover, at any one time, 40% of that supply was stale. JA 61.

prospective sales representatives, evaluating the Wisconsin sales force, and communicating personnel decisions; although he made recommendations concerning salary raises, they often were disregarded by the Chicago district manager. JA 52-53, 98, 103, 112-115. During the entire six-year period in issue, only a few hiring decisions were made and only two representatives were terminated. JA 52, 102-106.

Procedural History

In 1980, petitioner issued a "Notice of Franchise Tax Assessment" claiming that Wrigley owed franchise tax, interest and penalties for the years 1973 through 1978 in the total amount of $246,641.04. R. 15. Ex. 1. Wrigley petitioned for a redetermination on the ground that Section 381 precluded the assessment because the company did not engage in business within Wisconsin in a manner sufficient to subject it to the State's taxing jurisdiction. R. 15, Ex. 2. On September 3, 1981, petitioner denied Wrigley's petition, resulting in a total assessment of $271,707.63. R. 15, Ex. 3.

Wrigley then took its case to TAC. An evidentiary hearing was held before Commissioner William Bradford Smith on August 26 and 27, 1985. R. 15; JA 2-123. Before TAC could issue its decision, however, Commissioner Smith left the Commission as a result of a legislative reorganization. His replacement was Commissioner Robert Junceau, an attorney with petitioner at the time the Wrigley case was heard by TAC. R. 15; a.1.

Without consulting Commissioner Smith, the only commissioner to take any evidence, TAC nevertheless proceeded to decide the case. It held that Wrigley's activities in Wisconsin exceeded the scope of protection afforded by 15 U.S.C. § 381 and that Wrigley was therefore subject to taxation in Wisconsin. A 243.

Both Wrigley and petitioner appealed TAC's decision to the Circuit Court of Dane County, Wisconsin. R. 15. In

its Memorandum Decision and Order dated August 20, 1987, the circuit court reversed because TAC had made its decision without Commissioner Smith's participation. The circuit court found that where TAC's findings turned upon the credibility of Wrigley's witnesses or upon the weight or inferences accorded their testimony, Commissioner Smith's impressions were vital. The court questioned TAC's findings that Wrigley's regional sales manager was involved in credit matters, that its representatives maintained offices in their homes, and that Wrigley conducted regular and periodic training seminars in Wisconsin, "amongst others." The court also cautioned that any assessment of Wrigley's immunity from taxation must be conducted on an annual basis, without lumping together activities that might have covered several years. R. 15; A 204-217.

Upon remand, TAC met with Commissioner Smith. He filed a written statement to the effect that he found the Wrigley witnesses to be "extremely credible." He stated further that, because petitioner "offered nothing to controvert them," he would have proposed findings of fact and conclusions of law in Wrigley's favor. R. 15; a.2. Despite the impressions of the evidence given by the one commissioner who actually heard it, a three-member TAC majority nevertheless reaffirmed its prior decision in a brief order issued in November 25, 1987. R. 15; A 163-167. The order was accompanied by a lengthy dissent by one commissioner in favor of Wrigley. R. 15; A 168-203. (The chairperson, Kevin C. Potter, did not participate.)

Both Wrigley and petitioner appealed to the circuit court, and their appeals were consolidated. The circuit court (a different judge presiding) again reversed TAC and held that Wrigley was not liable for the franchise tax at issue. In a lengthy study of the record, the court determined that TAC's factual findings were either unsupported by any evidence or rested on questionable interpretations of the facts. A 110-112. After carefully analyz-

ing the legislative history of 15 U.S.C. § 381 and numerous cases from other States, the court concluded:

> Wrigley's enterprise in this state was solicitation of orders for its products and no other. Each of [Wrigley's] activities was either inextricably related to that enterprise, or was so isolated an exception to common practice that it should not be viewed as forfeiting the protection of the statute. [A 131.]

Petitioner appealed to the Wisconsin Court of Appeals. On December 7, 1989, the court of appeals, splitting 2 to 1, reversed the circuit court's decision. The majority found that Wrigley's activities within Wisconsin were beyond the protection of the statute. A 71. In his dissenting opinion, Judge Dykman criticized the majority for failing to analyze the case in the context of chewing gum industry custom and concluded that, when properly analyzed, Wrigley's Wisconsin activities were too isolated and infrequent to give rise to tax liability. A 75-77.

The Wisconsin Supreme Court granted Wrigley's petition to review. On February 19, 1991, Wisconsin's high court issued a unanimous decision reversing the court of appeals. After studying the factual record, reviewing the legislative history, and analyzing the cases upon which the parties relied, the court concluded that "Wrigley's activities in Wisconsin did not go beyond the 'solicitation of orders' as that term is used in 15 U.S.C. sec. 381." A 45.

SUMMARY OF ARGUMENT

This case is one of statutory construction alone; there are no constitutional issues. The key phrases in the governing statute, "business activities" and the "solicitation of orders," were intended by Congress to be read in their normal commercial sense, meaning the on-going process and related activities by which orders are sought and resought. That the activities included in these phrases could not possibly have been limited to a simple request for an order is evidenced by the fact that petitioner does not

argue for such a construction, virtually no court has adopted it, we are aware of no commentator who has proposed it, and the legislative history affirmatively shows that this was not the construction intended.

Congress sought through Section 381 to reverse two state court cases imposing tax liability in which this Court denied certiorari, and in each of those cases the solicitation activities went beyond mere requests for orders. The state courts that have given the greatest amount of attention to the meaning and purpose of the statute have concluded, as did the Wisconsin Supreme Court below, that ordinary and necessary "business activities" accompanying the solicitation process are immune from taxation. Courts must, therefore, look to how a product is sold. In the chewing gum industry, the sale of a single pack is largely inconsequential; repeat orders are essential.

The pre-sale/post-sale test proposed by petitioner ignores the reality of the marketplace. Because shelf life is short and purchases are largely made on impulse, the solicitation of chewing gum orders necessarily involves a never-ending series of sales-related activities, such as placing displays and the replacement of stale gum. The pre-sale/post-sale test also would be impossible to administer. It fails to account for the on-going nature of solicitation, which is designed to guarantee a continuing stream of orders, thereby making the "end" of any single sale meaningless. It also would enmesh the courts in a quagmire of litigation over issues such as when a sale was completed and whether the normal wrap-up activities following that sale vitiated the income tax immunity.

The guidelines proposed by the *amicus* Multistate Tax Commission are closer to the mark, but they would not change the results in the two cases Congress intended to reverse, and they treat as immune certain activities that the Commission itself claims are nonimmune. In any event, the record in this case, as properly construed by the court below, would place Wrigley within the immune guidelines.

Section 381, properly interpreted, clearly precludes Wisconsin from imposing an income tax upon Wrigley. Wrigley did virtually nothing within the State during the years in question other than deploy its five or six-person sales force to carry out normal sales functions. Orders were sent outside the State for approval or rejection and were filled by shipment or delivery from outside the State. Credit and collection activities were handled out-of-state. The company was not licensed to do business in Wisconsin, it did not own or lease real estate there, and it had no bank account, office, manufacturing plant, or warehouse in the State. It was not listed in a Wisconsin telephone directory, and its salesmen's business cards did not carry Wisconsin addresses or telephone numbers. Wisconsin advertising was contracted for by an independent agency outside the State. Personnel decisions were all made out-of-state. In short, Wrigley's in-state activities were either direct solicitation or inextricably bound up in such solicitation, and any deviation was *de minimis*.

Petitioner's "nexus" argument should be directed to Congress, not this Court. Congress has plenary power over interstate commerce and has, through this statute, directed that the States forego taxation of sales solicitation alone. Whether or not there is nexus in a given case is thus irrelevant.

Finally, the Court should approach this statute not in the narrowest possible sense but with an understanding that Congress was concerned about companies having to pay lawyers and accountants, and fill out forms, just to keep up with the demands of the States in which they make sales. A narrow construction of the statute would defeat this Congressional intent by forcing companies to sustain compliance burdens that would make multi-state operations infeasible. The Court should not so hold, and thereby frustrate Congress' regulation of interstate commerce.

ARGUMENT

I. THE STATUTORY LANGUAGE AND ITS HISTORY SUPPORT THE RESULT BELOW

Contrary to petitioner's view, this case, unlike the one that is to be argued in tandem with it,[6] presents no constitutional questions. Instead, the only issue before the Court is one of statutory construction. All statutory construction, of course, must begin with the words of the statute itself.

Section 381, insofar as relevant here, prohibits a State from imposing a net income tax upon an entity engaged in interstate commerce if that entity's only in-state "business activities * * * are * * * the solicitation of orders * * * for sales of tangible personal property," so long as orders are sent outside the State for approval and are filled from a point outside the State. Since it is conceded that the orders in this case were sent outside Wisconsin to Wrigley's headquarters in Illinois for approval and were filled by common carrier shipment into Wisconsin from Illinois, Ptr. Br. 7, the sole issue before the Court is whether the limited "business activities" in which Wrigley engaged constituted "the solicitation of orders" within the meaning of Section 381.

The use of the term "business activities", of course, is significant, for it not only establishes the context of the endeavor as commercial, but also speaks of a plurality of events. Moreover, "solicitation" covers more than a single, specific request or entreaty; it is a process, rather than an event that occurs at one fixed moment in time. Thus, the term "solicitation" has been defined in terms of "the pursuit" and "practice" of soliciting.[7] "Solicita-

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[6] *Quill Corp.* v. *North Dakota*, No. 91-194.

[7] *Webster's Third International Dictionary*, p. 2169 (1976). Similarly, a "solicitation" to a crime can include a number of acts by which the actor "enticed" or "otherwise encouraged" a person to commit the crime. *Blacks Law Dictionary*, p. 1249 (5th Ed. 1979).

tion," in short, thus covers a range of activities designed to bring about a particular result—in this case, the placing of orders for chewing gum. And the most common example of "solicitation" is "selling" [8], which undeniably can be an on-going process.

Literal definitions to one side, there can be no question in this case but that Congress intended more than a simple request for an order to be immunized from taxation. We are aware of no commentator who has taken the position that only the request is immune, nor has virtually any court so held. Petitioner itself does not contend that the statute is so limited.[9] Finally, as shown below, the legislative history conclusively demonstrates that more than a request for a sale was intended. We thus use legislative history not to urge a construction of

[8] *Webster's Third New International Dictionary of the English Language*, p. 1629 (unabridged 1961).

[9] For example, the pre-sale/post-sale standard urged on the Court by petitioner would admittedly permit "such activities as the use of samples and product demonstrations." Ptr. Br. 25; *see also id.* at 32.

With one exception, the *amici* supporting petitioner similarly do not take an absolutist view. The City of New York concedes that certain *de minimis* activities might be immunized, and that the ownership of samples and calls on customers of customers with "display techniques" would be immunized. NYC Br. 10-11, 14, 18-19. The brief of 29 States concedes that the Act immunizes "those customary or generally accepted acts which lead to the placing of orders" and then lists a number of immunized activities that go well beyond a simple request for a sale. Brief of Amici Curiae on the Merits In Support of Wisconsin Department of Revenue ("29 States Br.") at 4, 13. MTC agrees that "solicitation" includes not only activities that directly seek the placement of an order but "such collateral activities that are a necessary part of that effort." MTC Br. 24. Only the brief of New Jersey, Alaska and Arkansas ("N.J. Br.") at 1, 3-5, 9, supports the "strict" construction of *Clairol, Inc.* v. *Kingsley*, 109 N.J. Super. 22, 262 A.2d 213, *aff'd*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1971), and, as noted below, that opinion gives no reasons for its conclusion.

the statute that contradicts its plain meaning but to support an interpretation fully consistent with that meaning where Congress itself has failed to lay down the metes and bounds of the language used.[10]

The fact that Congress intended the statute to immunize a number of activities beyond a simple sales pitch is confirmed as well by the history of how Section 381 became law.

The first event that caught Congress' attention was this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), which included the decision in a consolidated case, *Williams* v. *Stockham Valves & Fittings, Inc.* As was made clear repeatedly during the Floor debates in both Houses and in the Senate and House Reports,[11] the *Northwestern States* decision triggered alarm bells in the commercial community because of the limited nature of activities carried on by the companies in those cases. The Court's decision, however, dealt entirely with a constitutional question—whether sufficient nexus existed between the taxing States and the companies' in-state activities. This Court held that the companies' activities established a sufficient nexus to satisfy the Commerce and Due Proc-

[10] *See United States* v. *Owens*, 484 U.S. 554, 562-563 (1988); *compare Chisom* v. *Roemer*, 111 S. Ct. 2354, 2362-67 (1991), *with id.* at 2369 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); *also compare Commissioner* v. *Clark*, 489 U.S. 726, 740-745 (1989), *with id.* at 728 n.* (Scalia, J., declining to join majority's discussion of legislative history); *cf. Union Bank* v. *Wolas*, 60 U.S.L.W. 4043, 4045 (U.S. Dec. 11, 1991) (Court refuses to use legislative history to refute plain meaning of statute).

[11] S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2549, 2557; S. Rep. 453, 86th Cong., 1st Sess. at 1-2, 5-6, 8, 11-12 (1959); H.R. Rep. 936, 86th Cong., 1st Sess. at 1-3 (1959); 105 Cong. Rec. 11395-17836.

ess Clauses, and, since the taxes were non-discriminatory and properly apportioned, they were constitutional.

Because both companies in the *Northwestern States* cases worked out of sales offices located in the taxing States,[12] Congress did not intend for Section 381 to reverse that decision, since the use of such offices went beyond what Congress intended to immunize.[13] However, Congress did intend to immunize the other aspects of the companies' activities,[14] and these included a number of services beyond simple requests for orders. For example, in one case salesmen drove company-owned cars, contacted customers of customers, and received claims for loss or damage in shipments, and in the other salesmen were engaged in "promotion and good will" for their companies and kept not only supplies on hand but "advertising literature" as well.[15]

While *Northwestern States* created the initial impetus, it was this Court's denial of certiorari in two other cases that galvanized Congress to action, as petitioner apparently concedes.[16] *Brown-Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So.2d 70 (1958),

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[12] *Northwestern States*, 358 U.S. at 454, 455.

[13] *See* S. Rep. 936, 86th Cong., 1st Sess. at 3 (1959); 105 Cong. Rec. 16930 (1959). In fact, a Bill that would have allowed such offices, S. 2524, was defeated. *See* 105 Cong. Rec. 16355, 16477 (1959).

[14] *See* n.11, *supra*.

[15] *Northwestern States*, 358 U.S. at 454-456. Some of these facts were explicitly pointed out to Congress. *E.g.*, 105 Cong. Rec. 16353 (1959).

[16] "Although [*Northwestern States*] may have created the initial impetus for legislative action, Congress was also reacting to two later cases in which the Court refused to grant certiorari. * * * [Section 381] may have intended to reverse the results reached in [those two cases] * * *." Ptr. Br. 23-24.

appeal dismissed, cert. denied, 359 U.S. 28 (1959); *International Shoe Co.* v. *Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). There were no local offices in these cases, and the legislative history is replete with evidence that Congress intended to immunize at the very least the types of activities involved in those cases. We do not base this statement of Congress' intent on a stray reference to, or a single legislator's comment upon, these cases. *Cf. United States* v. *Bass*, 404 U.S. 336, 346 (1971). Rather, *Brown-Forman* and *International Shoe* were *each* cited and discussed over a dozen times in Committee reports and during Floor debates.[17] Time and again, Congress was told that the dangers posed by these two cases had to be met and corrected, or companies would be mired in multiple-state tax compliance obligations, being forced to fill out so many forms that many could not afford to conduct business outside their own States.

In light of the pervasive presence of these cases in the legislative history, and the inescapable conclusion that Congress sought to overrule them,[18] we turn to their facts to find examples of the types of activities Congress intended to encompass within "solicitation of orders."

In *Brown-Forman*, the salesmen—or "missionary men" —not only sought orders but accompanied and assisted their wholesale customers' salesmen "in obtaining a suitable display of [Brown-Forman's] merchandise at the business establishments of said retailers."[19] *Brown-Forman*, 101 So.2d at 70. In other words, the salesmen

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[17] *E.g.*, S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2549; H.R. Rep. 936 at 2, 3; 105 Cong. Rec. 16360, 16367, 16376, 16470, 16471, 16475, 16493, 16496, 16500, 16929, 16930, 17771 (1959).

[18] *See* H. Rep. No. 1480, 88th Cong., 2d Sess. 145 (1964); Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 293, 302-303 (1985).

[19] *Brown-Forman*, 101 So.2d at 70; *see also Brown-Forman* Pet. for Cert., Oct. Term 1958, No. 142, at 4.

took to the road and helped create demand for the product by obtaining displays not only in their customers' locations but in the locations of retailers who ultimately placed orders through wholesalers.

In *International Shoe*, a Stipulation of Facts revealed that fifteen salesmen "regularly and systematically" solicited customers, producing over $15 million in sales during the three years in question. The salesmen carried samples of shoes from place to place in company-owned automobiles, and they made use of "hotel rooms or rooms of a public building which have sample rooms available for salesmen," paid for by International Shoe to display their samples.[20] In other words, they engaged in far more than simple requests for orders; they actively sought business on a broad front and in a variety of company-sponsored settings.

Again, it is clear that when Congress repudiated these two decisions, it was attempting to allow solicitation in the sense in which it is used in its normal commercial setting. Congress intended to immunize all efforts—"business activities"—legitimately made to obtain orders and to keep those orders coming so as to generate profits.

Moreover, to interpret "solicitation of orders" in terms of a single act—the sales pitch for such orders—would make no sense. It would mean that a company was theoretically immune from taxation for the sales pitch itself but nevertheless taxable because the salesman drove to the location of the customer, assessed the customer's potential, displayed samples, made notes of the customer's needs, handed out a business card with the telephone number of the home office, prepared a sales report, or performed other acts inextricably bound up in making

[20] *International Shoe*, 107 So.2d at 640; *International Shoe* Pet. for Cert., Oct. Term 1958, No. 807, at 7-8; *International Shoe* Oppos. to Cert. at 2.

One activity that Senator Byrd specifically said would be immunized by Section 381 was renting a hotel room to display samples to potential customers. 105 Cong. Rec. 16353-54 (1959).

the sales pitch. Without immunity for these ancillary aspects of the business of solicitation, no company would be able to qualify for Section 381's immunity, and the statute would be a nullity.

II. THE WISCONSIN SUPREME COURT CORRECTLY CONSTRUED SECTION 381 AND ADOPTED A STANDARD THAT CARRIES OUT CONGRESS' INTENT

A. Petitioner Mischaracterizes the Holding Below

The Wisconsin Supreme Court formulated a sensible, restrained standard for applying Section 381 in cases where the issue is whether an out-of-state company's "business activities" within the State exceed the scope of "solicitation" protected by the statute:

> When analyzing a claimed immunity under 15 U.S.C. sec. 381, a court should look at whether the activities are closely associated and inextricably bound up with "solicitation of orders." [A 41.]

The court recommended that several factors be considered in making this determination. Courts should consider "[n]ot only what is done, but what is *not done* in a state," and should keep in mind "the type of business involved, and the manner in which products are sold and orders are solicited." A 42 (emphasis in original). Courts also should analyze any activities which are alleged to exceed the scope of protected solicitation in relation to all of the company's activities to determine if they are *de minimis* deviations from normal practice. *Id.*[21]

[21] Petitioner claims that the court below erred by not focusing on Wrigley's share of the market. Ptr. Br. 20-21. But that is an argument, like so much else in the briefs of petitioner and the *amici* supporting it, that should be addressed to Congress. In fact, one of the arguments made in *International Shoe*—which Congress intended to overrule—was that the company was making multi-million dollar sales in the taxing State. *See* p. 16, *supra*. There is no distinction based on size or market share in the statute. On the

In so ruling, the Wisconsin Supreme Court aligned itself with the courts of Pennsylvania and New York, which had construed Section 381 similarly. A 35-44, citing *United States Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, 478, *cert. denied*, 439 U.S. 880 (1978) (" 'solicitation' does not stop at the moment a prospective customer (or wholesaler) is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate consumer, also fall under the rubric 'solicitation' "), and *Gillette Co.* v. *Tax Commission*, 56 App. Div. 2d 475, 393 N.Y.S.2d 186 (3d Dept. 1977), *aff'd*, 410 N.Y.S.2d 65 (1978). The court's reliance upon *United States Tobacco* was particularly appropriate, inasmuch as no other published decision involved such closely analogous products and solicitation activities (which also were concerned with the freshness of the company's products and the prominence of the product displays).

The Wisconsin court's decision was firmly grounded on the legislative history of Section 381, as extensively analyzed by the *United States Tobacco* court, 386 A.2d at 477-478.[22] *United States Tobacco* and *Wrigley* are thus

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contrary, one of the objections made by those *opposing* the statute was that a company could ship to all 50 States, "do $100 million worth of business," and still not pay "a thin dime in income tax" except in its home State. 105 Cong. Rec. 16358 (1959); *see also id.* at 16470, 16493, 16496, 16500. Amendments offered to make the statute applicable only to small concerns or inapplicable to those with more than a minimum amount of sales in a State were defeated. *See* 105 Cong. Rec. 16491, 16499, 16501 (1959).

[22] The *amici* brief of three States criticizes the Wisconsin Supreme Court for relying upon a Senate report accompanying the predecessor to Section 381. N.J. Br. 8. Their argument rests on the fact that the Bill as reported was amended to delete a provision allowing for the maintenance of an in-state office. But the portions of the report quoted by the Wisconsin Supreme Court do not concern the office provision and remain valid despite the deletion of that provision. *See* A 28-29.

the only published decisions which pay any disciplined attention to Congress' intent in enacting the statute. This Court declined to review the Pennsylvania Supreme Court's decision in *United States Tobacco.*

Petitioner mischaracterizes the Wisconsin Supreme Court's decision when it states that the court's essential holding is "that any activity whose purpose is 'encouraging future orders' constitutes 'solicitation.' " Ptr. Br. 25. The court simply held that "[t]he mere fact that these orders [*i.e.*, orders which result from activities for which immunity is sought under the statute] may be future orders does not necessarily result in loss of immunity." A 41. Petitioner's conclusion that this construction of the statute would result in all of Wrigley's activities, including even manufacturing, being deemed solicitation of orders is wholly wrong. Petitioner also criticizes the Wisconsin Supreme Court for construing the statute so "that immunity is the rule and taxation the exception." Ptr. Br. 25. Petitioner, however, is unable to cite any part of the text of the decision to support such a criticism.

Rather than attempt to accomplish Section 381's purposes through an exercise in line-drawing or list-making, the court, like Congress, articulated a standard which focuses upon the essential character of the activity in question and whether an activity of such character falls within the scope of "solicitation of orders." *See*, A 43-44 ("The rental storage space is certainly not the type of warehouse Congress envisioned when it referred to a company losing immunity under 25 [sic] U.S.C. sec. 381 for maintaining a warehouse").

Thus, the standard articulated by the Wisconsin Supreme Court embodies the legislative intent of Section 381: to immunize from state income taxation not only the "pure" solicitation of orders but also the "business activities" routinely associated with deploying a sales force to conduct the solicitation, so long as there is no

office, plant, warehouse or inventory in the State. As one commentator has put it:

> The essential purpose and design of Public Law 86-272 were to grant tax immunity to out-of-state vendors who are not "local merchants," but have salesmen in the State who solicit orders for acceptance out-of-state and for shipment of the goods to customers from other States. Activities such as checking inventory, assistance in display of a promotion, dealing with shipment delays, damaged merchandise, and the like typify the customary functions of sales representatives of out-of-state merchants. [J. Hellerstein, *State Taxation*, 245 (1983).]

B. The Standard Applied Below Is Superior to Those Urged by Petitioner and the Amici Supporting It

Petitioner suggests that the primary purpose of Section 381 was to create clarity and certainty in the wake of *Northwestern States*. To this end, it urges the Court to adopt a "bright line" test in the form of a line of demarcation drawn through the point of sale. Such a line purports to distinguish "solicitation" from "non-solicitation" activities by characterizing all sales activities as either leading to or following the placing of orders. Ptr. Br. 25. This effort, however, would enmesh the courts in a quagmire of decision-making over when a sale actually occurred (whether, for example, at the time of order, delivery, acceptance, or payment) and whether a whole series of activities (such ~~as a~~ call to determine whether delivery was made or discussions over replacement orders) came inside or outside the "bright line" of sale.

The pre-sale post-sale test ~~also~~ ignores the commercial reality that, for most products, solicitation activity which follows chronologically in the wake of one sale is nevertheless causally related to another sale yet to come. Which specific sale, then, is a court to use as its measure? Because the timing of such activity makes little difference to the essential character of the activity, it will be impossible

in most cases for the courts and taxing authorities to draw the line the test requires, and to decide whether a particular act of solicitation leads up to one sale or follows from the previous sale. The likely result is that cases will be decided arbitrarily and inconsistently, the very same activity being characterized differently by different courts in different cases. In the end, tax practitioners and business planners will be no less confused and uncertain than they claim to be now.

The standard articulated by the Wisconsin Supreme Court is superior to the pre-sale/post-sale test because it concentrates on the promotional character and purpose of the activities, as well as the business realities of the market in which they take place, rather than merely upon the point in time at which they occurred.

By way of example, soliciting orders for chewing gum is not like soliciting an order for a 60-ton generator. Years of effort might be devoted to the sale of that generator and, once the purchase is made, the seller might be heard from no more. In fact, such a sale might well be a once-in-a-lifetime experience for both buyer and seller. To the manufacturer of chewing gum, on the other hand, the sale of a single pack is of relatively little consequence; it is the ongoing process by which packs are sold and replaced, and new packs are noticed, sold, enjoyed, and replaced, that is the key to successful solicitation. The placing of a display, the on-the-job training of a salesman, and the replacement of stale gum are all integral parts of "solicitation"—of the appeal to customers and consumers to buy and rebuy, of the "pursuit" and "practice" of seeking to obtain a steady stream of orders. If, for example, a consumer chews a stick of stale gum, the significance is not in the event itself but in the after-fact: that he may never purchase another pack. Thus, the practice of discovering and replacing stale gum is, like so much else that a chewing gum salesman does, inextricably bound up in soliciting sales.

In the real world, the effort to encourage the customer to place more orders is what characterizes "solicitation", and that effort is a constant undertaking, an ongoing activity that does not necessarily begin or end with a given sales pitch or a particular order. With a product sold in a constant volume, customers are repeatedly replenishing their stock—such as is the case with Wrigley's product and customers. In sum, drawing a line against certain solicitation activities simply because they do not take place until after a particular sale cannot be justified, even though these activities share the same qualities, purposes and characteristics as the activities that take place before the sale, and are, themselves, geared to future sales.

Furthermore, petitioner fails altogether to show that Congress intended such a line to be drawn. Nowhere in the legislative history is there any mention of such a standard. In fact, there is no evidence that Congress attached any significance whatsoever to the point in time when the activity was conducted.

In truth, petitioner's test defeats Congress' intent. If the pre-sale/post-sale test effectuated Congress' purpose, it should reproduce the outcome Congress sought when applied to the facts of the cases that Congress intended Section 381 to overrule. It does not.

For example, if the pre-sale/post-sale test has any validity, it should change the outcome in *Brown-Forman*. Brown-Forman was held subject to state taxation because its missionary men assisted wholesalers to obtain suitable displays of merchandise in retail establishments. This type of activity could take place either before or after any sale—although the display of a product, as a rule, takes place after the sale of the product. It comes as no surprise that the Supreme Court of Louisiana did not specify whether those visits were made before or after a given sale; the timing of the visits was immaterial to the promotional character of those activities.

Similarly, in *International Shoe*, salesmen rented hotel rooms or rooms in public buildings to display their wares. Under petitioner's test, this activity would be immune if a sale was made; but the immunity presumably would evaporate if the salesman failed to consummate a sale or if he stayed in the room and attempted to make further sales but was unsuccessful. The immunity also apparently would not cover his activity in paying for the rented space and returning left-over goods to wherever they were kept. Such an "immunity" would in fact be illusory, and *International Shoe* would remain in full force and effect.

Thus, under the suggested pre-sale/post-sale test, the results in *Brown-Forman* and *International Shoe* would not change. If the test cannot accomplish Congress' purpose in the archetypical cases, it certainly will not effectuate the legislative will in the broad range of cases to which Congress intended it to be applied. This Court should not do what Congress failed to do—rewrite the statute so as to grant immunity only in terms of "sales," or of activity that precedes sales. "Business activities" relating to "solicitation" are necessarily broader.

MTC proposes that the Court define solicitation as "activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort." As a corollary, any activity which "serves the out-of-state seller beyond the direct attempt to secure the placement of an order" is a "dual-purpose" activity and is not immune from taxation. MTC Br. 24.[23]

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[23] Many of the activities conceded by the 29 *amici* States to be immunized under Section 381 apparently would not pass MTC's test. Examples of permissible activity given by these States include "demonstrating how the product works, answering questions regarding pricing or warranties, leaving product brochures or samples to be tried by the prospective customer, or even telling the prospective customer how the product might be resold if the customer purchased it." 29 States Br. 13.

This standard, although it appears more neatly tailored than the pre-sale/post-sale test, is no better suited to carrying out Congress' purposes, and will produce no fairer or more certain results, than will the standard articulated by the Wisconsin Supreme Court. With regard to its ability to achieve the results Congress intended, the MTC standard can be tested in the same way that the pre-sale/post-sale standard was tested: apply it to the facts of *Brown-Forman* and *International Shoe* to see whether the outcome changes.

In *Brown-Forman*, the missionary men do not appear to have been seeking "directly" the placement of any orders; the immediate focus of their activity was on the arrangement of merchandise, not on the sale of additional merchandise, and not on additions to the inventory of the retailer or wholesaler. In *International Shoe*, the renting of display space, like advertising, could as easily be geared to good will as to direct sales. The relationship between display activities and the placement of orders would appear to be indirect at best in both instances, and therefore the activities would not be immune. Congress' intent would be thwarted.

Nor is the MTC standard any more useful in practice than the pre-sale/post-sale test. Appended to the MTC brief are the guidelines developed by MTC and used in practice by the taxing authorities in a number of States. One would presume that MTC's proposed standard is consistent with these guidelines and would reliably predict what kinds of activities are immune and nonimmune under them. (MTC suggests that the test it proposes is reflected in its guidelines. MTC Br. 25.)

Such is not the case, however. For example, among the activities the MTC considers immune under its guidelines is "[p]assing inquiries and complaints on to the home office." MTC Br. App. 7, ¶ 4. Certainly this is not an activity which seeks the direct placement of an order, nor can it be said, under the strict interpretation MTC

gives its own standard, that passing on complaints is a collateral activity that is "necessary" to seeking the direct placement of orders. Thus, a clearly-established immune activity under the guidelines would be nonimmune under MTC's proposed standard, demonstrating that the standard will hardly promote clarity or certainty.

Furthermore, while the MTC guidelines are not a definitive treatment of what Congress meant by "solicitation of orders," they at least give some real-world evidence of what is ordinarily thought to be included within solicitation. The guidelines were drafted by taxing authorities with a certain agenda and bias, but their content is influenced by the kinds of activities with which revenue agents have become familiar over the years. The fact that there is agreement among the States that "[p]assing inquiries and complaints on to the home office," *id.* (or, for that matter, "[c]hecking of customers' inventories", *id.* at ¶ 7) falls within the scope of protected solicitation shows that the standard articulated by the Wisconsin Supreme Court ("activities [that] are closely associated and inextricably bound up with 'solicitation of orders' ", A 41) is in the mainstream of what even those seeking to enhance state revenues consider solicitation to be.

Finally, as we show below, Wrigley's activities, as revealed by the record and properly interpreted by the Wisconsin Supreme Court, are encompassed by the immune list urged upon the Court by MTC; Wrigley did not engage in any of the nonimmune activities, with one possible exception.[24] Therefore, even if the Court were to

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[24] Guideline number 12 under nonimmune activities lists "[h]iring, training or supervising personnel." MTC Br. App. 6, ¶ 12. Wrigley's final hiring decisions were made in Chicago, not in Wisconsin, and, as noted elsewhere, Wrigley did not conduct formal training sessions in the State. As for "supervising," however, if this indeed were a non-immune activity, virtually no company in the country could qualify under the statute, since salesmen, like all employees, must always be supervised, in one fashion or another, wherever they operate.

adopt these guidelines, the judgment below should be affirmed.

III. THE COURT SHOULD IGNORE LABELS AND CONCENTRATE INSTEAD ON WHAT CONGRESS ATTEMPTED TO ACCOMPLISH

Characterizing the decision of the Wisconsin Supreme Court as being in the "minority," petitioner suggests that the Court should interpret Section 381 in a way that a purported "majority" of courts have—narrowly, petitioner implies. Ptr. Br. 20; *see also* MTC Br. 17. We dispute that the decision below is part of a minority, but in any event, counting heads will be of little assistance to the Court in determining what Congress intended in this statute. Although issues surrounding the application of Section 381 have confronted courts of last resort around the country, all but a few have addressed the issues without bothering to explore Congress' intent. In fact, many of their decisions were rendered without any statutory analysis at all.

For example, the *amici* States of New Jersey, Alaska and Arkansas urge the Court to adopt the *per curiam* holding of the New Jersey Supreme Court in *Clairol, Inc.* v. *Kingsley, supra*. *Clairol*, like so many other cases in this area, was decided strictly on its facts, without any effort whatever to formulate a rule to govern other cases on other facts. The *Clairol* court did not even articulate the rule or standard which guided it to its own decision. The case is of no value here,[25] as attested to by the fact

[25] The three States also note that this Court dismissed *Clairol* for want of a substantial federal question on appeal from the New Jersey Supreme Court. They suggest that, through this summary disposition, the Court essentially ratified the New Jersey court's interpretation of Section 381. The dismissal in *Clairol*, however, clearly is not controlling in the present case. This Court does not accord full precedential value to summary dispositions, because they are rendered without a full opportunity to consider the issues after

that *amici* MTC and the City of New York do not cite it at all, and the 29 State *amici* mention it only in passing, without discussion. 29 States Br. 8.

Likewise, little can be gleaned from cases that attempt to categorize the holdings of other cases according to labels such as "strict," "broad" or "narrow." *See, e.g., Chattanooga Glass Co.* v. *Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979) (*quoted in* Ptr. Br. 19-20). These labels have little inherent meaning; they are relative terms, gauged without reference to any fixed standard.

Take the decision on review in this case: petitioner labels it "expansive." Ptr. Br. 20. However, the standard articulated by the Wisconsin Supreme Court would not have reversed the outcome in *Clairol*, perceived to represent a "strict" construction of the statute. In that case, the taxpayer provided in-state technical service to its customers, an act which is not closely associated with or inextricably bound up in solicitation (servicing a product and selling a product being two separate and self-sustaining business activities). The outcome in *Clairol* would have been the same regardless of whether it was decided under the purportedly "strict" view of the New Jersey Supreme Court or under the supposedly "expansive" view of the Wisconsin Supreme Court. As this comparison reveals, the fact-intensive nature of the published decisions in this area makes comparing cases on the basis of these labels unproductive.

In this regard, petitioner seeks to have the Court impose the narrowest possible definition of "solicitation." But the

briefing and argument. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *see also Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2113 n.4 (1991); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); W. Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974) ("No one seriously contends that these summary affirmances receive the full consideration that is given to a case argued on the merits and disposed of by written opinion").

fact is that Congress repeatedly expressed its concern about two taxpayer burdens that such an interpretation would not ameliorate: double taxation of companies by States using different formulas for apportionment, and the burdensome cost of recordkeeping and compliance.[26] Congress did not want companies to have to maintain records, retain counsel, and hire accountants in order to keep up with the tax practices in a multitude of jurisdictions. *See* 105 Cong. Rec. 16930 (1959). If a narrow view of solicitation is adopted, most companies will have to revert to carrying the very burdens that Congress sought to avoid, because virtually no company is as restricted in its activities as petitioner describes. Thus, what petitioner really seeks is to achieve through this Court what it has been unable to obtain from Congress—an eviscera-tion of the statute.

IV. THE STATUTE NECESSARILY RECOGNIZES AN EXCEPTION FOR DE MINIMIS ACTIVITIES

Petitioner and the *amici* argue that the presence of the term "only" in the statute precludes any exception for nonimmune activities, even if they are so infrequent and inconsequential as to be *de minimis*. However, there is no evidence that Congress intended to be so unforgiving of trifling departures from normal practice.

On the contrary, the *de minimis* principle is one so well rooted in the law that Congress must be presumed to have recognized it. In fact, the principle has been recognized by this Court in a long line of cases,[27] was noted during

[26] *See, e.g.*, S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2550-51; S. Rep. No. 453 at 3-6; 105 Cong. Rec. 11958, 16362, 16479, 16484, 16495, 16500, 16929-30, 17772-75, 17837 (1959).

[27] *E.g., Texas State Teachers Ass'n* v. *Garland Ind. School District*, 489 U.S. 782, 792 (1989); *CFTC* v. *Schor*, 478 U.S. 833, 856 (1986); *Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 (1984); *United States* v. *Jacobsen*, 466 U.S. 109, 125 (1984); *Lynch* v. *Donnelly*, 465 U.S. 668, 684 (1984); *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 450-451 n.34 (1984); *Brown* v. *Thomson*, 462 U.S. 835, 847 (1983); *Clements* v. *Fashing*, 457 U.S. 957, 967 (1982); *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 494 n.7 (1980); *Washington* v. *Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 n.29 (1979); *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.21 (1979); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 111 (1977); *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977); *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 18 (1976).

the debate on this very statute,[28] and was implicitly provided for by petitioner in its own regulations.[29]

Without such an exception, the State could defeat the whole purpose of Section 381 by discovering at least once a year some minor, unintended or overlooked deviation from a company's normal way of doing business. No matter how scrupulous a company is, the exigencies of the

[28] In the discussion of a proposal that would have allowed the use of an office in the taxing State so long as its "sole" use was to serve those soliciting orders, Senator Bennett pointed out: "It [such a bill] would not prevent what might be called minimal or incidental and accidental use of the office." 105 Cong. Rec. 16469 (1959).

In addition, petitioner's tax counsel wrote to the Senate Finance Committee during hearings on this legislation:

> [The] fact is that a number of States have been imposing taxes on income earned in interstate commerce for some years now and they have followed a policy of restraint as to occasional, irregular, or inconsequential activities * * *. [*State Taxation of Interstate Commerce: Hearings on S.J. Res. 113, S. 2213 and S. 2281 before the Senate Committee on Finance*, 86th Cong., 1st Sess. 225 (1959) (statement of Arthur B. Barber).]

[29] Section Tax 2.82(3), Wis. Admin. Code, drafted after this case arose, describes petitioner's view of the line between protected and unprotected solicitation under Section 381 and provides that foreign companies may engage in "usual or frequent" activity in the State without triggering tax liability. Implicit in such a regulation is the acknowledgement that unusual or infrequent (i.e., *de minimis*) activity falling outside the scope of solicitation is insufficient to support tax jurisdiction.

business world are bound to cause it to veer off course on occasion. How could a company ever predict its tax base if it legitimately carried out its business under the statute during the bulk of the year but suddenly became liable for an entire year's taxes because of a glitch or passing incident? That is why this Court has been chary to impose "'grave legal consequences upon * * * distinctions that are of *de minimis* meaning and effect.'" *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 773 (1984) (*quoting Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962)).

V. WRIGLEY'S BUSINESS ACTIVITIES IN WISCONSIN WERE PROTECTED FROM TAXATION BY SECTION 381

As the Wisconsin Supreme Court found, "[e]ach of Wrigley's activities in Wisconsin during 1973-1978 were incidental to the solicitation of orders of gum [and in any case were] * * * so minor as to be *de minimis*." A 41. Through overstatement and unfair characterization, petitioner and the *amici* attempt to show that Wrigley's activities were beyond the scope of solicitation. Viewed correctly, the facts of this case demonstrate that Wrigley is entitled to the immunity of Section 381.

For example, petitioner and at least one *amicus* cite to the rare involvement of Wrigley's regional sales manager for the years 1973-1975 in credit matters. *See* Ptr. Br. 27; MTC Br. 24-25. The evidence shows that in a few instances he intervened on behalf of the *customer* and only for the purpose of cultivating the client and encouraging future sales, not to obtain payment or collection. JA 71-73. These activities were necessary to make sales and were inextricably bound up in the attempt to solicit business from those customers. Certainly these activities furthered no interest of Wrigley in collecting past due accounts.

As another example, petitioner and MTC accuse Wrigley of maintaining an in-state warehouse. Ptr. Br. 27; MTC Br. 23. In fact, the record demonstrates that an insignificant amount of space was rented at nominal cost by a single employee in his own name in order to store his samples while he was not on the road. The employee rented this space because he lived in an apartment too small to accommodate these samples. JA 61-62, 100-101. The Wisconsin Supreme Court was not troubled by this activity, which was necessary to that salesperson's ability to solicit orders in Wisconsin, because this rental was an isolated exception to Wrigley's normal practice and was "not the type of warehouse Congress envisioned when it referred to a company losing immunity * * * for maintaining a warehouse." A 43-44.

Petitioner attempts to create the impression that Wrigley maintained a stock of inventory in the State and made direct sales from it. Ptr. Br. 32. The inventory to which petitioner refers is the representatives' supply of sample/replacement product typically kept at the representatives' homes. As noted above, the nature of the product Wrigley was trying to promote dictated that stale product be replaced with fresh. This was not a means of filling orders; it was a promotional necessity. Thus, as the *United States Tobacco* court found in almost identical circumstances, stale product replacement is "precisely the kind of sales activity" envisioned by "solicitation." 386 A.2d at 478; *see also Gillette*, 393 N.Y.S.2d at 188 (permitting foreign companies to "insure [that their products were] attractively arranged and in saleable condition"). Furthermore, given how miniscule the amount of inventory was, and the fact that at any given time 40% of it was stale, this activity was *de minimis*.

Petitioner also takes issue with the fact that Wrigley supported and supervised its distant sales force with an in-state salesperson who doubled as a manager. Although most of the time spent by this employee was in pursuit of chewing gum orders, he played a role (but not the

decision-making role) in personnel matters involving local sales employees. JA 90-91, 98, 103-104, 112-115. These activities were "necessary" activities—activities which, like providing a company car, are incidental to the sales pitch and necessary to delivering it. Because a foreign company may be located at a distance from the solicitation State, it would be unfair and unrealistic to expect all such activities (conducting interviews, finding candidates, giving on-the-job training, evaluating employees' performance, and providing local input into home office decisions, such as termination) to be conducted exclusively outside the State's borders. The ministerial nature of these activities is evidenced by the fact that recommendations by the regional sales manager were often ignored by the home office; they certainly do not change the overall promotional character of the company's presence in the State. *See United States Tobacco*, 386 A.2d at 479 (providing company cars does "not change the character of [the company's] promotional activities" and should be viewed as within the scope of Section 381).

Likewise, petitioner treats the assigning of experienced representatives to work with new hires in the field as tantamount to the conduct of "training center[s]." Ptr. Br. 32; *see also id.* at 10. When viewed realistically, however, these activities are "necessary" to support, and incidental to, an ongoing solicitation effort in the State. The same is true with regard to the fact that the regional manager for the years 1973 to 1975 kept a desk and a company-owned file cabinet where he prepared his reports at home in the corner of his basement. Not only is such an activity a common-sense companion to the activity of soliciting sales at some distance from headquarters, but it is simply too thin a reed to support the exercise of state tax jurisdiction over interstate commerce.[30]

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[30] Petitioner makes passing reference to Wrigley's use of a Wisconsin landfill to dispose of stale gum. Ptr. Br. 9, 33. The evidence was that stale gum was normally packaged and returned to Chicago, but that in one part of one of the six years in question it was sometimes taken to a local dump (which might have been private) for disposal. JA 39, 45, 61, 118. This fact was so insignificant that it was not even referenced by the courts below.

The argument has been made that, when Wrigley's various unprotected activities in Wisconsin are viewed in combination, they are beyond *de minimis*. That approach is unsound for two reasons. First, Section 381 requires that the activities of the taxpayer be analyzed in each separate "taxable year." 15 U.S.C. § 381 (a)(1). Not all of the activities analyzed above took place in each of the six years at issue, so combining the activities that took place in separate years would violate the statute. *See* A 211. Second, these activities are *de minimis* even if considered together; they do not change the essential and overwhelming character of Wrigley's presence in Wisconsin, geared to the solicitation of orders for chewing gum.

VI. PETITIONER'S ARGUMENT RELATING TO NEXUS SHOULD BE ADDRESSED TO CONGRESS

Petitioner argues in the second section of its brief that because "[n]exus jurisprudence has undergone a considerable evolution," Ptr. Br. 29, Section 381 should be construed so as to permit Wisconsin to impose an income tax upon Wrigley. This contention is wide of the mark.[31] To the extent that "nexus jurisprudence" has evolved, this "evolution" has affected the authority of the States only in those commercial contexts in which Congress has remained silent. Where, as here, Congress has enacted a statute explicitly regulating the taxing authority of the States, the "evolution" of nexus jurisprudence is simply irrelevant.

Petitioner attempts to bolster its argument by pointing out that Congress, in passing Section 381, "recognized that

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[31] It is also an afterthought, having not been made below.

the concept of nexus would continue to be defined by the courts." Ptr. Br. 28. This assertion, although true, proves nothing. As the Senate Report quoted by petitioner explains, Section 381 permits the judiciary to determine "whether business activities *other than those described in the bill*" justify the imposition of a state income tax. S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2554 (emphasis added). With respect to the "solicitation of orders," the matter already has been resolved definitively by Congress; States may not impose an income tax premised on such activity.

Petitioner also notes that "nexus" doctrines have evolved so as to establish a "'"consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax."'" Ptr. Br. 30 (*quoting Trinova Corp.* v. *Michigan Dept. of Treasury*, 111 S. Ct. 818, 828 (1991) (*quoting Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980))). Again, although this assertion may be true, it relates only to this Court's constitutional jurisprudence and thus is not relevant. Petitioner suggests that the same "economic realities" informing this Court's decisions under the Due Process and Commerce Clauses should control its interpretation of Section 381. *See* Ptr. Br. 30. But this fallacious implication, like the other "nexus" arguments advanced by petitioner, reflects a fundamental misunderstanding of the different roles that Congress and the courts play in regulating interstate commerce.

The Commerce Clause explicitly grants to Congress, rather than to the courts, the authority to regulate "commerce among the several states." U.S. Const. art. I, § 8, cl. 3. It is true that this Court has long held, *see Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that the Commerce Clause by negative implication allows the federal judiciary to free "interstate commerce from [certain] restrictions * * * impos[ed] by the States." *Northwestern States*, 358 U.S. at 458. But this implied power of the

courts exists only so long as Congress remains silent; when Congress chooses to act, its "power * * * over commerce * * * is not restricted, except as the Constitution *expressly* provides." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946) (emphasis added).

The *Prudential* decision makes clear that it is Congress, rather than the courts, that has "plenary and supreme authority" over interstate commerce. *Id.* at 423. There, the Court considered the validity of a tax that South Carolina imposed on out-of-state insurance companies conducting business within its borders. Because local insurance companies were not subject to a comparable levy, the tax clearly discriminated against interstate commerce. The Court nevertheless upheld the tax because Congress, acting pursuant to its express authority under the Commerce Clause, recently had passed the McCarran Act.

The McCarran Act, which is still effective, provides in pertinent part that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the insurance] business by the several States." 15 U.S.C. § 1011. The *Prudential* Court reasoned that because this federal statute authorized the imposition of discriminatory state taxes, there was no reason for the Court even to consider whether the challenged South Carolina tax ran afoul of the Commerce Clause. The Court reasoned that such analysis was unnecessary because Congress had "expressly stated its intent and policy." *Id.* at 427.

In this case, as in *Prudential*, there is no reason for the Court to consider whether the challenged state action "would be valid in the dormancy of Congress' power," *id.*, for the simple and undisputable reason that Congress *has* acted. The judicial authority cited by petitioner in the second section of its brief, like the arguments advanced therein, is thus rendered totally inapposite; with

one exception,[32] each of the decisions cited is concerned with constitutional limits on state power when Congress is silent.[33] The petitioner in *Prudential* made the same mistake, and it was discussed at length by the Court:

> No one of them [the cited cases] involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. * * * [C]onsequently, * * * they [cannot] stand as controlling precedents * * *. [328 U.S. at 421.]

Petitioner's misguided "nexus" arguments are inconsistent not only with this Court's decisions, but also with Congress' pronouncements; Congress has long recognized its own primacy in the area of interstate commerce. Indeed, the Senate Report relied upon so heavily by petitioner, *see* Ptr. Br. 21, 23, 28-29, provides that questions left unresolved by Section 381 are "for future determination *by the Congress*, or *in the absence of congressional action*, by the courts." S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2554 (emphasis added).

All that remains are petitioner's arguments that immunizing the "solicitation of orders" from state income tax is " 'antediluvian,' " Ptr. Br. 33 (*quoting* Pomp, *State Tax Reform for the Eighties: The New York Tax Study Comm'n*, 16 Conn. L. Rev. 925, 927-928 n.8 (1984)), and inconsistent with "economic realities." Ptr. Br. 32. These are policy arguments, however, that must be addressed to the Congress, rather than to this Court, which is bound to reject such invitations to amend federal statutes. *See Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 280 (1978); *United Steelworkers of America* v. *R.H. Bouligny, Inc.*, 382 U.S. 145, 150-153 (1965).[34]

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[32] Petitioner and several *amici* rely heavily upon this Court's decision in *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275 (1972). Their reliance is misplaced. *Heublein* held simply that Section 381 does not prohibit a State from regulating the activities of a foreign corporation—such as by requiring the maintenance of a warehouse within the State—even if such regulation incidentally causes the corporation to forfeit its Section 381 immunity.

[33] One of the "nexus" cases upon which petitioner mistakenly relies is *D.H. Holmes Co.* v. *McNamara*, 486 U.S. 24 (1988). There, the Court upheld a Louisiana use tax imposed upon a large Louisiana department store. Not surprisingly, the Court found that the department store's contacts with Louisiana more than satisfied the constitutional prerequisite of "substantial nexus." *Id.* at 32. The fact that the Court, in making this finding, stated that there was "nexus aplenty," *id.* at 33, clearly was not meant to suggest that a new legal standard had been adopted. But to the extent that "nexus aplenty" has judicial relevance, it is only in those cases, such as *D.H. Holmes Co.*, in which Congress has not acted.

[34] The argument advanced by the MTC in its *amicus* brief is another policy argument that should be addressed to Congress. The complexities of devising a rational system of apportioning income among several States may be considered by the Court when, in the absence of Congressional action, the Court develops constitutional rules governing the state taxation of interstate commerce. But when Congress has passed a law such as Section 381, which explicitly regulates the imposition of state income taxes on businesses engaged in interstate commerce, the Court's limited duty is to construe the statute.

CONCLUSION

For all of the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

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December 20, 1991

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No. 91-119

In The

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. WRIGLEY'S CONSTRUCTION OF § 381 DOES NOT PROMOTE CLARITY AND CERTAINTY AND RESULTS IN THE PROTECTION OF LARGE RATHER THAN SMALL BUSINESS.

A. Congress' Goal In Enacting § 381 Was To Create Clarity And Certainty So That Small Businesses Would Continue To Attempt To Develop New Markets In Other States.

The Court itself has said that the "impetus" behind the enactment of 15 U.S.C. § 381 was its decision in *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450 (1959) and that "[c]larity that would remove uncertainty was Congress' primary goal." *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972).

Senator Ervin, a proponent of the senate bill, explained that one of its goals was to "prevent the erection of trade barriers" by granting relief to "small businesses, which cannot maintain large legal staffs and many accountants[.]" 105 Cong. Rec. 16481 (1959). After passage of the Talmadge Amendment, the bill was transformed from one which would have protected many existing sales activities conducted by larger foreign corporations through their sales offices to one which permitted "small businesses" to send salesmen into other states in order to compete with "[b]ig business concerns." 105 Cong. Rec. 16493 (1959). Through the passage of § 381, such businesses were assured that "'mere solicitation'" could be conducted in foreign states. *Heublein*, 409 U.S. at 280.

Under Wisconsin's pre-sale/post-sale solicitation standard, only those acts occurring prior to the sale which seek to induce the prospective customer to place an order are permissible. Wrigley's protestations to the contrary notwithstanding (Resp. Br. at 21), solicitation need not be successful. And, to use Wrigley's terminology, "acts inextricably bound up in making the sales pitch" (Resp. Br. at 16-17) do not lose their character as solicitation activities even if some sales have already been made. But acts, such as the replacement of stale or damaged goods, performed in connection with prior sales result in a forfeiture of immunity under § 381.

The Multistate Tax Commission's "dual purpose" test (MTC Br. at 24) provides a useful framework for assessing whether the acts in question are inextricably related to the sales pitch. For example, Wrigley's credit mediation activities, which were discontinued in 1976, may have benefitted the customer by enabling it to receive an uninterrupted supply of gum, but they also enabled Wrigley to solve accounting and other problems with the delinquent account. They, therefore, are not inextricably related to the sales pitch.

The ensuing portion of this brief explains why Wrigley's analysis of the relevant provisions of § 381 fails when tested, not only against the manner in which § 381 was construed in *Heublein*, but also against Congress' goal of affording limited immunity to small businesses in order to enable them to compete with their larger counterparts (Pet. Br. at 22-23). In our original brief, we explained how Wisconsin's pre-sale/post-sale solicitation standard passes those tests.

B. The Language Employed By Congress Is The Starting Point For Determining How It Alleviated The Uncertainty Created By *Portland Cement*.

Congress did not immunize all business activities conducted by a foreign corporation. In § 381(a), it defined those "business activities" that would not support taxation as being limited to "solicitation."

While touting the reasoning of the decision below, Wrigley surreptitiously attempts to disavow its holding that the ordinary and accepted meaning of the term "solicit" is to "ask," "entreat," "importune" or "request" that an order be placed. *Webster's Third New International*

Dictionary 2169 (Unabridged 1961). *See William Wrigley, Jr. Co. v. DOR*, 160 Wis. 2d 53, 465 N.W.2d 800, 809 (1991). Without citing any applicable canon of federal statutory construction that permitted it do so, that court nevertheless turned immediately to the legislative history of the statute in order to ascertain the meaning of the term "solicitation." *Id.*, 465 N.W.2d at 809.

If the statutory terminology does indeed have the "plain meaning" (Resp. Br. at 13) ascribed to it by the court below, then it did not need to refer to the legislative history at all. *See Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). To the extent that the meaning of the term "solicitation" is plain, the Wisconsin Supreme Court should therefore have adopted the construction of that term employed by the Arkansas and New Jersey courts (Pet. Br. at 19 n.8). *Also see U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990). Since the court did not adopt that construction, its resort to legislative history is supportable only if the term "solicitation" is determined to be ambiguous.

C. Wrigley's Construction Of "Solicitation" Does Not Result In The Minimum Deviation From The Commonly Understood Meaning Of That Term Which Produces Clarity And Certainty.

Wrigley's position is that Congress "failed to lay down the metes and bounds of the language used" (Resp. Br. at 13) (footnote omitted). If that is the case, then the term "solicitation" is ambiguous. In *Heublein*, 409 U.S. at 281-82, the Court explained how it will construe ambiguous terms in this very statute: "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance,'" *quoting*

United States v. Bass, 404 U.S. 336, 349 (1971). *Accord, Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.33 (1986).

Wrigley does not explain how its construction of the term "solicitation" comports with the methodology employed in *Heublein* for construing ambiguous terminology in § 381. Instead, it simply praises the court's reliance in *Wrigley* upon the majority holding in *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. den.*, 439 U.S. 880 (1978), claiming that those are the only two state court decisions which are "firmly grounded on the legislative history" (Resp. Br. at 18).[1]

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[1]In contrast to other state courts, the Oregon Supreme Court has "been in the vanguard of the States in developing an interpretation of 'solicitation'" because the State of Washington imposes no income or franchise tax. P. Hartman, *Federal Limitations on State and Local Taxation*, § 9:11, at 507 (1981). It has issued five published decisions construing § 381 and has had the benefit of thorough tax court decisions in each of those as well as other cases. *See* Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 319 nn. 211, 212 (1985). In *Smith Kline & French Laboratories v. State Tax Com'n*, 241 Or. 50, 403 P.2d 375 (1965), it initially accepted the tax court's adoption of a broad solicitation standard like that advocated by Wrigley, thereby prohibiting Oregon from taxing any of the income realized in that case. Thereafter, in a series of decisions culminating in *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1986), both the tax court and the supreme court determined that such a broad legal standard was not supportable, but that a pre-sale/post-sale standard comported both with the language of the statute and with Congressional intent. This change was not motivated by provincial considerations, as evidenced by the fact that the taxpayer in

(continued...)

Without identifying the canon of statutory construction it had decided to employ, the court in *U.S. Tobacco*, 386 A.2d at 477, did make one rather lengthy reference to the Senate Report. But it also relied heavily on its own decisions from areas of state law unconnected with § 381 for the proposition that the term "solicitation" in the federal statute should be expansively construed. *Id.*, 386 A.2d at 479.

The two dissenters were unmoved by the four person majority's "disciplined attention" (Resp. Br. at 19) to the Senate Report. They felt the majority should have applied the canon that § 381 must be construed "to impose as few limitations upon the traditional state power to impose taxes as is consistent with the clear language of the section." *Id.*, 386 A.2d at 482. That is in the same kind of reasoning that the Court used in construing § 381 in *Heublein*. Wrigley has advanced no explanation as to why the Court should retreat from that rationale in this case.

Wrigley also suggests that any ambiguity in the term "solicitation" should be resolved by reference to the Louisiana Supreme Court's decisions in *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert. den.*, 359 U.S. 28 (1959) and *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d

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[1](...continued)
Miles also avoided a portion of Oregon's tax by resorting to the provisions of § 381. When viewed in its entirety, the body of case law developed in Oregon is far more comprehensive than that developed in Pennsylvania and followed below. To the extent that deference should be accorded a particular state's decisional law due to the thoroughness of its examination of the parameters of § 381, that deference is therefore due the state of Oregon.

640 (1958), *cert. den.*, 359 U.S. 984 (1959) because they contributed to the "'considerable concern and uncertainty'" generated by the Court's later decision in *Portland Cement. Heublein*, 409 U.S. at 279-80, *quoting* S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2551.

There is no suggestion in the legislative history that Congress intended to define "solicitation" by approving the use of particular activities described in these or any other cases. The published decisions in *Brown-Forman* and *Fontenot* are exceedingly brief. Although Wrigley attempts to supplement the facts stated in the decisions themselves by making reference to certiorari petitions and opposing briefs filed in those cases, the legislative history suggests only that members of Congress were aware that certiorari had been denied in each case. There is no indication that they had detailed knowledge of the contents of documents filed with the Court when certiorari was sought in each case. The published decision in *Fontenot*, 107 So. 2d at 740, is in no way inconsistent with a pre-sale/post-sale solicitation standard, since it merely indicates that the company's "sole activity within this state consists of the regular and systematic solicitation of orders for its product by fifteen salesmen."[2] Similarly, the decision in *Brown-*

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[2]Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer at 302-03 (Resp. Br. at 15 n.8), says only that the result reached in *Fontenot* has been altered. And Wrigley's reliance on the Willis Report, H. Rep. No. 1480, 88th Cong., 2d Sess. 145 (1964), to support its argument is misplaced:

> Such history does not bear strong indicia of reliability, however, because as time passes

(continued...)

Forman, 101 So. 2d at 70, indicates that the "missionary men" involved in that case did *not* "solicit []or accept orders from the retail dealers." That published decision contains no indication that orders were solicited on behalf of the wholesaler by "missionary men." Since Congress did impose a "solicitation" requirement in connection with such activities, any concern it may have had with *Brown-Forman* cannot have related to specific activities of that company's "missionary men" in retail establishments. The only specific activities endorsed in the statute described the company's dealings with its wholesalers, from whom orders *were* solicited by "missionary men":

> [I]t ships its goods to customers in Louisiana upon orders submitted by the latter to its representatives in Louisiana who transmit said orders to Louisville where they are considered and approved or rejected . . . in the event of approval of the orders, the merchandise is shipped directly to the customer who remits payment to it at Louisville . . . .

Brown-Forman, 101 So. 2d at 70. *See* § 381(a)(1).

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[2](...continued)

> memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

The "results reached in *Brown-Forman* and *Fontenot*" (Pet. Br. at 24) were that the systematic use by a foreign corporation of "missionary men" and "salesmen," respectively, without more, created nexus sufficient to tax. In §§ 381(a)(2) and 381(a)(1), Congress reversed each of those results. But it limited the activities that could be performed by such individuals "only" to "solicitation," without endorsing any set of business activities described in any particular reported decision. *See, e.g.*, Hartman, *"Solicitation" and "Delivery" Under Pub. L. 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 390 (1976): "There is doubt whether a seller comes within the protection 'of solicitation' of orders only in state where the seller rents and display room." Since Wisconsin's pre-sale/post-sale standard does not preclude the use of either "salesmen" or "missionary men," it is not inconsistent with the legislative history of § 381.

To be sure, no construction of "solicitation" should be accepted that does not promote the goals of clarity and certainty identified by the Court in *Heublein*. But the court below admitted that the pre-sale/post-sale test does meet those goals. *Wrigley*, 465 N.W.2d at 809. Although that decision contains no language expressly coupling a physical facilities standard with a prohibition on in-state activities "routinely associated with deploying a sales force" (Resp. Br. at 19), any such standard would not promote clarity because it contains no yardstick for determining what that sales force can and cannot do. That problem was cogently addressed by the court of appeals below when it found that Wrigley had assigned a myriad of non-solicitation activities to its "sales" force. *William Wrigley, Jr. Co. v. Wis. DOR*, 153 Wis. 2d 559, 451 N.W.2d 444, 452 (Wis. App. 1989).

In the same vein, Wrigley suggests that Congress must have intended to immunize more than "'pure' solicitation" (Resp. Br. at 19). Again, Wrigley fails to explain how its alteration of two letters results in any change in the meaning of the term "mere solicitation" employed by the Court in *Heublein*, 409 U.S. at 280, 282.

No meaningful distinction is tenable. The industry-specific "solicitation" standard advocated by Wrigley hardly promotes clarity or certainty under the self-assessment system necessarily employed by all states which impose income or franchise taxes on foreign corporations. It presumes familiarity by taxing officials in each state with all methods employed by every industry in every other state in order to increase sales. Neither the statute nor the legislative history even remotely purport to impose such a burden.

Unlike each of the standards proffered by the *amici* supporting Wisconsin, Wrigley's standard also offers no clear point of departure for determining when a "business activity" conducted in a foreign state does *not* constitute "solicitation." Its only suggestion is that "in-state technical service" is "an act which is not closely associated with or inextricably bound up in solicitation" (Resp. Br. at 27). Conceptually, such activities are indistinguishable from complaint handling, picking up damaged goods and the like, because technical services can readily be characterized by the putative taxpayer as "legitimately made to obtain orders and to keep those orders coming so as to generate profits" (Resp. Br. at 16). Such a construction inevitably and inexorably permits any in-state activity by a foreign corporation whose sole business ultimately involves the sale of tangible personal property at retail, unless the activity involves the use of physical plant. Its necessary consequence is the pure physical

facilities standard which Wrigley's tax manager employed (JA 5; T_1:28). That standard, which Wrigley did not even meet during the tax years in issue, fails when tested against the language actually employed by Congress to deal with the uncertainty resulting from *Portland Cement*.

D. The Statutory Term "Only" Promotes Clarity And Certainty By Precluding An Ambiguous *De Minimis* Exemption From Taxation Based Upon The Volume Of Sales Or Other Activities Conducted Within The Taxing State.

The states supporting the use of a pre-sale/post-sale standard have convincingly demonstrated that the term "only" in § 381 means exactly what it says (Br. of Iowa, *et al.* at 8). Even *U.S. Tobacco*, 386 A.2d at 477, a decision hailed by Wrigley for its acumen in construing § 381, so holds.

Wrigley's response is that Congress must have been aware that the *de minimis* doctrine has been recognized by the Court in many different contexts (Resp. Br. at 28-29 and n.27). However, none of the cases cited even remotely involve statutes employing the term "only" so as to limit the preexisting powers of the states in an area as fundamental as taxation. Moreover, if Congress was indeed aware of such cases, its use of the term "only" is even more consistent with the premise that it did not want a *de minimis* doctrine employed in connection with this particular statute.

Wrigley also argues that a short exchange on the senate floor, 105 Cong. Rec. 16469 (1959), concerning the proposed insertion of the word "sole" in a section of the bill that was never adopted indicates that Congress must have

intended to create a *de minimis* exception when it used the term "only" in other sections of the adopted bill, even though the meaning of the latter term was never discussed.

Exemptions from taxation resulting from language employed by Congress "must be unambiguously proved." *U.S. v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). The statements and bill draft unsuccessfully relied upon by the taxpayer in that case were far more extensive than the brief colloquy cited by Wrigley here. *Id.*, 485 U.S. at 358. The legislative history relied upon therefore lacks the degree of probative value necessary to establish Wrigley's claim.

Next, Wrigley suggests that policy reasons dictate creation of a *de minimis* exception because a foreign corporation could not "predict its tax base" if a "glitch" were to occur (Resp. Br. at 30). No explanation is provided as to how such activity would be detected by a state in which a foreign corporation deliberately chooses not to file, as Wrigley did in this case (JA 3; T_1:25-26). Moreover, by its own admission (Resp. Br. at 5), Wrigley authorized its sales representatives to use the agency stock check procedure. In addition, both its regional manager and its sales representative "got permission from the company" to store an automobile and stock of goods in the Madison warehouse and were assured that they would be reimbursed by Wrigley for those costs (JA 62; T_2:22).

Wrigley also lamely claims that Wisconsin has long recognized a *de minimis* exception to § 381 (Resp. Br. at 28 nn. 28, 29). The authorities cited are a letter written prior to the passage of § 381 and a state administrative code provision enacted after the tax years in issue. Although Wisconsin may choose not to extend its taxing authority to the full extent permitted by § 381, there is no suggestion

that it did so during any of the tax years involved in this case. The two items cited by Wrigley, however, do not construe § 381 at all. They refer to the amount of solicitation necessary to support a finding of nexus. *Compare Miller Bros. Co. v. State of Maryland*, 347 U.S. 340 (1954). In contrast to *Miller Bros.*, here there is "'nexus aplenty.'" *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988). That nexus provides Wisconsin with jurisdiction to tax, and Congress must speak clearly when it chooses to withdraw such authority. Since the language it employed does not even remotely suggest a *de minimis* concept, no such statutory exemption can be said to exist.

E. Under Any Plausible Construction Of § 381, Wrigley Engaged In Activities Beyond The "Mere Solicitation" Of Orders.

The Wisconsin Supreme Court viewed this case as presenting "a question of law." *Wrigley*, 465 N.W.2d at 806. It therefore reviewed the construction of "solicitation" employed by the court of appeals and the Wisconsin Tax Appeals Commission *de novo*. *Id.*, 465 N.W.2d at 807. However, it did not overturn any of the Commission's findings of fact, which are reviewable under the substantial evidence test also employed by this Court in tax cases. *Compare Norton Co. v. Department of Revenue of State of Ill.*, 340 U.S. 534, 537-38 (1951) *with Nelson Bros. v. Revenue Dept*, 152 Wis. 2d 746, 760, 449 N.W.2d 328 (Wis. App. 1989). To the extent that the Commission's findings of fact are challenged by Wrigley, they should be tested under the standard of review described in those cases.

As to burden of proof, under Wisconsin law, "the burden of showing error in an assessment is on the taxpayer. Failure to present any evidence showing error

means that the case must be decided against the taxpayer." *Woller v. Department of Taxation*, 35 Wis. 2d 227, 233, 151 N.W.2d 170 (1967). Wrigley did prove that the practices of its two regional managers differed in some respects, thereby necessitating a procedural remand (not a reversal, as claimed by Wrigley) to the Commission to clarify its finding of facts concerning credit transactions (A 216). In all other respects, however, unless the record contains specific items of evidence to the contrary, any of Wrigley's practices which would justify the imposition of tax must be viewed as being applicable to all tax years in issue. This includes, for example, the disposal of stale gum in local landfills when a sales representative elected to do so (JA 39; T_1:92).

Under any construction of § 381, the fact that Wrigley authorized and ultimately incurred the cost of warehouse rental makes this an easy case. The size and cost of the warehouse rented is irrelevant; the question is whether the nature of the activity involves "mere solicitation." Under Wrigley's logic, the use of a very large warehouse at minimal cost or of an expensive bonded warehouse rented by an employe rather than Wrigley itself would be permissible, so long as the goods stored were used by its representatives to increase sales. Either device would facilitate additional sales by making frequent shipment of product unnecessary and assuring constant availability of all sizes and brands to every sales representative. Even under other bills defining immunity with reference to inventory and physical plant (Br. of Iowa, *et al.* at 19 n.3), Congress never distinguished between different kinds of warehouse space. It could not possibly have intended to immunize such activity.

Similarly, Wrigley's claim that its agency stock check procedure amounts to a *de minimis* violation of § 381 in

light of its huge dollar volume of Wisconsin sales, stands the purpose of the statute on its head. Under that rationale, a resident of Illinois who travels annually to Wisconsin to sell greeting cards and fills half of all orders received from the back of a station wagon would be subject to tax under § 381, even if the total dollar volume of all Wisconsin sales were less than the total dollar volume of Wrigley's agency stock checks alone. Although Wisconsin's position is that the agency stock checks and product swapping (Pet. Br. at 9), employed by Wrigley's sales representatives also constitute sales within Wisconsin, they surely involve delivery from a point within the state. To permit Wrigley to utilize such procedures in violation of § 381 when an itinerant sales representative with the same dollar volume of sales could not do so would transform the statute from a shield to be used by small businesses attempting to gain a toehold in new markets into a sword which could be used by large businesses to keep smaller competitors at bay.

Wrigley likewise contends, largely as a result of the small size and low cost of its product, that it did not have a stock of goods within Wisconsin. Each representative, however, generally had a minimum of 1,500,000 sticks of fresh and stale gum in his possession at any given time (JA 28; T_1:70–72). Wrigley apparently valued this gum for inventory purposes at approximately two to three cents per stick (JA 125–25; Ex. 13). A similar quantity or dollar value of both fresh and spoiled packaged grapefruit, for example, would necessitate the use of considerable warehouse space, even if up to forty percent of it were awaiting disposal in local landfills or shipment to Illinois. That this gum did, in reality, constitute a stock of goods within the state is illustrated by the fact that, on any given day, most of it remained in storage (JA 35; T_1:86).

Finally, Wrigley contends, in effect, that recruitment, hiring, training and firing of its Wisconsin representatives should not result in a forfeiture of immunity under § 381, because those activities were directed from Illinois. Wrigley then makes the related claim that all of these activities, as well as its sales meetings and in-state managerial activities are necessary to support the operation of a large but distant sales force.

All of the conduct described (Pet. Br. at 9-11), however, occurred in Wisconsin and did not involve solicitation at all, since there was no customer involvement or interest in Wrigley's performance of any aspect of any of these activities. As is the case with almost every defense it offers for its business practices, Wrigley also ignores the nature of the activity, and concentrates solely upon the role the activity plays in Wrigley's large multi-state operation.

The nature of the Wisconsin activity does not change merely because Wrigley chooses to add additional steps to the process in Illinois. The fact that such steps may be desirable or even essential to supervise continuous corporate activity sitused in other states serves only to illustrate that Wrigley has become too large to enjoy the benefits afforded by § 381. Its gargantuan size means that it no longer is able to engage in "mere solicitation." The operation of § 381 in that manner under Wisconsin's construction of the statute is entirely consistent with Congress' purpose of affording limited immunity to small businesses who must use sales representatives to develop new markets in foreign states.

II. THE PROVISIONS OF § 381 CANNOT BE CONSTRUED IN A VACUUM, WITHOUT REFERENCE TO THE ECONOMIC REALITIES INHERENT IN THE CONCEPT OF NEXUS.

A. In § 381, Congress Attempted To Eliminate Taxation Of Foreign Corporations By States In Which They Had Minimal Nexus.

In the debates on the bill, the Senate struggled with the definition of nexus. *See, e.g.*, 105 Cong. Rec. 16476 (1959) (statement of Senator Kerr). Its members viewed the provisions of § 381 as "set[ting] up a minimal standard" for the existence of nexus. 105 Cong. Rec. 17771 (1959) (statement of Representative Celler). That is why Senator Keating, a cosponsor of S. 2213, willingly switched his support to S. 2524:

> I believe that such a concept is equitable. A corporation which employs capital and labor and operates facilities within a State is an integral part of that State's economy and receives a variety of protective and other services for which the State should be compensated. Since these services directly relate to the income-producing activities of the company, a tax on income allocated to these activities is reasonable.
>
> On the other hand, a company which does not have a place of business in a State does not receive any benefits from the State which relate to its income-producing activities. Such a State does not put out a fire on the company's premises, it does not insure its employees against injury on the job, it does not protect its warehouses, it does

> not maintain the streets and highways or subways and utilities needed for the company's functioning. It provides nothing which would justify the exaction of an income tax from out-of-State firms.

105 Cong. Rec. 16362 (1959).

Any construction of the term "solicitation" should not ignore the fact that the very basis for the enactment of § 381 was a minimal benefit or nexus rationale.

B. Wrigley's Construction Of The Statute Discards The Concept Of Nexus That The Statute Reflects.

Wrigley misses the mark when it claims that Wisconsin's nexus arguments should be directed to Congress rather than the Court. Since it will not even know the precise parameters of the statute until this Court issues its decision, Wisconsin has no reason to even consider requesting amendments to any of the statute's provisions.

The relevance of the concept of nexus is that the definition of "solicitation" should immunize minimal state contacts by foreign corporations, not massive economic presence. In that regard, several aspects of this case present particular cause for concern.

Due to its huge sales volume and large share of the market, Wrigley's has extensive nationwide operations. It therefore chooses to employ resident sales representatives. How continuous residency affects immunity under § 381 is unclear. *Hartman*, 29 Vand. L. Rev. at 390. But the Court's decision in *General Motors Corporation v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Indus. v. Wash. State Dept. of Rev.*, 483 U.S. 232 (1987), clearly indicates that corporate activities conducted by resident employes will not immunize the corporation from a finding of nexus merely because they occur in the home.

In this case, Wrigley's managerial and storage activities based in its employes homes in Wisconsin are so broad in scope that any construction of the term "solicitation" which would preclude a finding of nexus as a jurisdictional basis to tax would be inconsistent with Congressional intent.

Similarly, Wrigley's Wisconsin operations are so extensive that it used Wisconsin landfills as well as taxpayer-financed public employment offices and universities. Any construction of the term "solicitation" should also reflect the economic realities of these benefits and taxpayer-financed subsidies conferred upon Wrigley in connection with its systematic and continuous exploitation of Wisconsin's consumer market.

CONCLUSION

For the reasons indicated herein and in petitioner's initial brief, the judgment of the Wisconsin Supreme Court should be reversed, the franchise tax assessment reinstated, and the cause remanded to the Wisconsin Supreme Court for further proceedings consistent with this Court's opinion.

Dated this 14th day of January, 1992.

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Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In attempting to fairly apportion otherwise taxable income from sales of tangible personal property within their boundaries by foreign corporations, how are the "solicitation" and "delivery" requirements in Pub. L. No. 86-272 to be applied by state taxing authorities in the face of conflicting decisions from state courts of last resort as to whether those requirements admit of a *de minimis* exception and as to whether "solicitation" encompasses post-sale activities "incidental" to the canvassing of retail customers.

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No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Multistate Tax Commission is the administrative arm of the Multistate Tax Compact (the "Compact"). ALL ST. TAX GUIDE ¶701 *et seq.* (Max. Mac. 1991); ST. TAX GUIDE ¶351 (CCH 1991). Nineteen States, including the District of Columbia, have adopted the Compact. In addition, fourteen States are associate members. The Compact seeks to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. Article I, Compact, ALL ST. TAX GUIDE ¶701 (Max.

Mac. 1991), St. Tax Guide ¶351 (CCH 1991). The Court recognized the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The Compact was developed by cooperation among States and taxpayers in response to the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 Multistate Tax Comm'n Rev. 1, 1 and 23. Specifically, member States of the Compact are committed to strengthening Our Federalism by resolving the inherent conflict of our federal form of government that presupposes both a single national economy and States with separate taxing authority. The member States of the Commission have accepted the challenge of federalism by developing uniform state tax rules of apportionment and allocation.

In furtherance of uniformity, the Multistate Tax Compact utilizes the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A Uniform Laws Annotated 331 (West 1985), as the core rules for the apportionment and allocation of income of a multijurisdictional business. Article IV, Compact, All St. Tax Guide ¶711 (Max. Mac. 1991), St. Tax Guide ¶351 (CCH 1991). The Multistate Tax Commission has further developed regulations interpreting UDITPA. *See* MTC Regs., All St. Tax Guide ¶600 *et seq.* (Max. Mac. 1991). Fostering state tax uniformity through voluntary state cooperation remains central to the Commission.

The Commission's uniformity effort relevant here is its Public Law 86-272 Guidelines, All St. Tax Guide ¶789 (Max. Mac. 1991), St. Tax Guide ¶370a (CCH 1991)

("Guidelines").[1] The Guidelines reflect the Commission's best understanding of congressional intent as expressed in Pub. L. No. 86-272. Consonant with the Commission's understanding of Tenth Amendment jurisprudence,[2] the Guidelines embraced a narrow interpretation of the state tax exemption so that the exemption would apply only in "those limited circumstances clearly and reasonably intended by Congress." App. 4.

The Multistate Tax Commission invited all states to adopt the Guidelines. App. 3. The Wisconsin Tax Appeal Commission accepted the invitation. Pet. for Cert. A-249 - A-253. From the undisputed facts of this case it seems clear that Wrigley's activities would violate several of the thresholds of the Guidelines. The Wisconsin Supreme Court surprisingly forewent application of the Guidelines by adopting an expansive interpretation of the state tax exemption. The Wisconsin Supreme Court's decision is surprising because it occurs in the face of the complaining taxpayer's characterization of Pub. L. No. 86-272 as unclear.[3]

By foregoing the Guidelines, the Wisconsin Supreme Court has unnecessarily frustrated the States' goal of preserving state tax jurisdiction to the maximum extent possible in the face of the requirements of, and the

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[1] The Guidelines as well as the Commission's adopting resolution are reproduced in the Appendix.

[2] *See South Carolina* v. *Baker*, 485 U.S. 505, 510 n.4 (1988).

[3] *See* Pet. Wrigley Br. before the Wisconsin Supreme Court at 14, 16-17. In contrast, Petitioner Wisconsin Department of Revenue argues that Pub. L. No. 86-272 is unambiguous. *See* Arguments I.C. and D. of Pet. for Cert.

policies reflected in, the U.S. Constitution and applicable federal law. The Wisconsin Supreme Court's decision also disconcertingly undermines the uniformity that the Multistate Tax Commission sought. The Wisconsin Supreme Court failed to recognize the opportunity and responsibility that States have to strengthen federalism through voluntary cooperative action.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court reached its erroneous determination because it failed to apply the Tenth Amendment jurisprudence of the Court and failed to be sensitive to the effect that its decision would have on the operation of all state tax systems. The Tenth Amendment jurisprudence of the Court and sensitivity to multistate taxation counsel that the state tax exemption of Pub. L. No. 86-272 be construed very limitedly to avoid unnecessary intrusion on the traditional state sovereignty. The Wisconsin Department of Revenue must prevail either if the legislative history of Pub. L. No. 86-272 clearly supports the taxing jurisdiction of the States or if the legislative history is unclear. Wrigley may prevail only if there is a *single* clear statement from Congress that supports an expansive state tax exemption.

Wrigley cannot satisfy the plain statement rule standard, because it is clear from the legislative history of Pub. L. No. 86-272 that Congress did not intend to do anything more than to protect mere solicitation as a stopgap, temporary measure. Congress was unwilling to do anything further until it had studied state taxation of

interstate commerce. *See* Title II of Pub. L. No. 86-272. Even if Wrigley is able to cite snippets of legislative history in its favor, such isolated references do not overcome the clear statements of Congress to the contrary.

The most appropriate construction of "solicitation" in Pub. L. No. 86-272 is that it is limited to those activities that directly seek the placement of an order and those collateral activities that are a necessary part of such activities. There is no room within the narrow construction of solicitation to allow activities that indirectly promote the sales business of a seller of tangible personal property in interstate commerce or to ignore activities clearly exceeding solicitation as *de minimis*. The member States of the Commission do not support as their primary position any relaxation of this very restrictive standard. Even the possible use of a pre-sale and post-sale test, as suggested by the State of Iowa, should be viewed as a next-best alternative to the position here stated.

ARGUMENTS

I. THE RELATIONSHIP OF PUB. L. NO. 86-272 TO STATE TAX APPORTIONMENT.

Understanding the relationship of Pub. L. No. 86-272 and the state tax rule for the apportionment of income derived from an interstate business should aid the review of this case. References are given to applicable provisions of the laws of the States of Wisconsin and Illinois (the State in which Wrigley based its operations), as they existed in the 1970's, and UDITPA, which has remained unchanged since its adoption by the National Conference

of Commissioners on Uniform State Laws in 1957.[4] Ill. Rev. Stat. ch. 120, §3-304 (1975); Wis. Stat. §71.07 (1973-1977); UDITPA §1, *et seq*. The basic understanding of the rules of apportionment have not changed substantially.

Income of a business engaged in interstate commerce is attributed to the various States which have contributed to its realization by the use of formula apportionment. Formula apportionment determines the actual apportionment factor that is used to attribute the income of a multijurisdictional business to each taxing State. The form of formula apportionment in most prevalent use among the States is a formula based upon three factors: the property factor, the payroll factor and the sales factor. The specific apportionment factor of each taxing State is determined by averaging the ratios of the in-state component to the everywhere component of the property, payroll, and sales of the business. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §9. The resulting apportionment factor is then applied to the income of the multistate business to determine how much of the income of the entire business is attributable to and taxable by each taxing State. As is subsequently explained, attribution of business income arising from sales of tangible personal property made in interstate commerce by the use of formula apportionment (which has the potential, depending upon the circumstances,

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[4] Only four States employ income tax statutes that differ widely from UDITPA. Warren, *Principles of Formulary Apportionment*, THE STATE & LOCAL TAX PORTFOLIO SERIES ¶200, ¶205 p. 207 (1989) ("Warren").

either to benefit or to disadvantage a taxpayer) is restricted to companies that are "taxable" in more than a single State.

The basic rules for determining the numerators and denominators of the ratios of the three factors are as follows. The denominators of each factor are equal to the total amount of the respective factors everywhere, *i.e.*, total property, total payroll and total sales. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A), 2(A), and 3(A) (1975); Wis. Stat. §71.07(2)(a)1., (b)1., and (c)1. (1973-1977); UDITPA §10, 13, and 15. The numerators of each factor are determined by reference to the extent of the presence of each respective factor in the taxing State, whether that State is the base State or another State. Thus, the numerator of the property factor for a State apportioning the income of a multistate business is equal to the amount of property present in that State. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A) (1975); Wis. Stat. §71.07(2)(a)1. (1973-1977); UDITPA §10. The numerator of the payroll factor is equal to the amount of payroll that is attributed to the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(A) (1975); Wis. Stat. §71.07(2)(b)1. (1973-1977); UDITPA §13. Payroll is generally attributable to the taxing State if the employee performs all of his/her services in the taxing State or all, but incidental, services in the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(i) and (ii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(a) and (b). Special rules apply if the employee performs more than incidental services outside the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(iii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(c). Sales for purposes of determining the numerator of the sales factor of the taxing

State are sitused on a destination basis, *i.e.*, on a basis of the State to which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16. Unlike the property factor and the payroll factor, the sales factor has a throwback provision. The throwback provision of the sales factor attributes sales that otherwise would be attributed to a State in which the multistate business is not "taxable" to the State from which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B)(ii) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16(b). Taxability for purposes of the sales factor throwback rule is defined in terms of jurisdiction to tax, including consideration of the effect of Pub. L. No. 86-272. *Id.*

As earlier noted, use of formula apportionment to attribute the income of a business engaged in interstate commerce is restricted. Formula apportionment is used only when the multistate business is "taxable" in more than a single State. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §2. If a business is not taxable in more than a single State, all the income of a multistate business is attributed to the single State in which the business is taxable. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(1) (1973-1977) (special allocation rules applied); UDITPA §2. A business is deemed taxable in another State when that other State has jurisdiction to impose a tax, regardless of whether the other State does in fact impose an income tax. Ill. Rev. Stat. ch. 120, §3-303(f) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §3. As is the case under the sales throwback rule, Pub. L. No. 86-272 is used to determine the extent to which a multistate business is taxable in

another State in the jurisdictional sense for purposes of determining eligibility to use formula apportionment. Thus, to the extent Pub. L. No. 86-272 bars a State from imposing an income tax, a business will not be treated as being subject to an income tax in the other State.

Because of differing state tax rates and other features of state income taxes, one cannot generalize whether a multistate business will desire to be subject to income tax in more than a single State. To illustrate this point, if a multistate business is based in a State with a high income tax rate, that business may wish to apportion its income out of the base State to another State with a low income tax rate or with no income tax in order to decrease the amount of income that is subject to tax in the base State. Conversely, if the base State has no income tax or a low income tax rate, the business may not wish to apportion its income out of the base State in order to preserve the advantage of this lower tax burden in the base State.

An aggressive taxpayer based in a State with a low income tax rate may still wish to be subject to income tax in at least one other State, however. The reason for desiring taxability in at least one additional State stems from the fact that a taxpayer will thereby be permitted to apportion its income by using the three apportionment factors, property, payroll, and sales, to determine its taxable income in the base State. Because only the sales factor has a throwback provision, a taxpayer *may believe* it can lessen its overall tax burden by being able to attribute some of its income to States in which it has property and payroll but is not subject to tax. *See* Warren, *supra* n.4 at ¶230.6 p. 224. Thus, to the extent a business has payroll

and/or property located in other States in which it is *not* subject to tax, the aggregate of the numerators of the payroll and property factors in the States in which it is subject to tax will be less (and the resulting aggregate state taxable income and state tax will be less). This possibility arises because specific items of property and payroll that are situsedto States not having the jurisdiction to tax are not thrownback to any other State in which the business is subject to tax. This result, if it is obtainable through carefully tax planning, is known as creating "nowhere income," income that is not taxable by any State because of the operation of the apportionment factors. If the multistate business were only taxable in the base State and was not taxable in at least one other State, the business would be ineligible to apportion its income and would be subject to tax on one hundred percent of its income in the base State.

It should be clear from this review that the result obtained from the use of Pub. L. No. 86-272 to determine whether a multistate business is taxable in another State (and hence subject to the use of formula apportionment) is directly affected by whether the state tax exemption of that law is narrowly or expansively construed.[5]

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[5] Litigated cases involving Pub. L. No. 86-272 can illustrate the point. *Compare U.S. Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978) (taxpayer wins with broad construction), *with Coors Porcelain Co.* v. *State*, 183 Colo. 325, 517 P.2d 838, *cert. denied*, 419 U.S. 874 (1974) (taxpayer loses with broad construction); *compare also Miles Laboratories, Inc.* v. *Dept. of Revenue*, 274 Or. 395, 546 P.2d 1081

(Continued on following page)

Although one cannot generalize about the revenue affect of a narrow or a broad construction of the state tax exemption of Pub. L. No. 86-272, this fact does not make the operation of Pub. L. No. 86-272 potentially any less intrusive upon the state sovereign taxing power. This is plainly apparent from the fact that Pub. L. No. 86-272 has the potential to prohibit the State into which the goods are sold (*i.e.*, the market state) from taxing a multistate enterprise that would otherwise be subject to tax under the Due Process Clause and the Commerce Clause. *See Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). An extreme example illustrates the point: A business based in a single State can sell all of its goods into another State and yet avoid any liability for income tax in the market State if it carefully limits its activities in the market State to mere solicitation. Even if the circumstances of the example are not so extreme, the intrusive nature of Pub. L. No. 86-272 is embodied in the fact that Pub. L. No. 86-272 allows goods to be sold into a market State by a multistate business that will not necessarily be subject to the market State's income tax. The intrusive nature of Pub. L. No. 86-272 is further observed in Argument II.B., *infra*.

(Continued from previous page)

(1976) (taxpayer seeks narrow construction to attribute income to State with no income tax) *with U.S. Tobacco Co.* v. *Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990) (taxpayer loses with narrow construction). It should also be noted that when a taxpayer has a loss, the taxpayer's objectives are likely to be achieved with treatment that is the opposite of what the taxpayer would want if the taxpayer has income.

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS ERRONEOUS, BECAUSE THAT COURT'S CONSTRUCTION OF PUB. L. NO. 86-272 WAS NOT INFORMED BY THE JURISPRUDENCE OF THE TENTH AMENDMENT WHICH REQUIRES CONGRESS TO STATE CLEARLY THE EXTENT TO WHICH STATE TAXATION IS PREEMPTED AND BY THE REQUIREMENTS OF MULTISTATE TAXATION IN OUR FEDERAL SYSTEM THAT INSTRUCT SENSITIVITY TO OTHER STATE TAXING SYSTEMS.

The impression left by the Wisconsin Supreme Court's analysis of Pub. L. No. 86-272 is one of an isolated jurisdiction wrestling with the construction of a statute that could easily have been passed by the State's own legislature instead of a statute passed by Congress that regulates state taxation of interstate commerce in our federal system. Specifically, the Wisconsin Supreme Court's decision in this case is devoid of any consideration of the rule of construction that applies to unclear congressional legislation that preempts fundamental state sovereign powers and of the effect that the construction of Pub. L. No. 86-272 would have on other state tax systems. This erroneous interpretative stance precipitated the Wisconsin Supreme Court's misinterpretation of Pub. L. No. 86-272.

A. The Jurisprudence of the Tenth Amendment Requires Pub. L. No. 86-272 Be Interpreted In A Manner That Is The Least Intrusive On The State Sovereign Taxing Power While Remaining Faithful To The Clearly Expressed Intent Of Congress.

The assumption of this alternative argument is that Pub. L. No. 86-272 cannot be interpreted by the plain

meaning of its statutory language and that resort to the collateral indications of congressional intent is required. Under the Court's Tenth Amendment jurisprudence, this statutory construction environment does not license a state supreme court to surmise congressional intent. Rather, the Wisconsin Supreme Court should have been informed that "Congress had rather limited purposes" in enacting Pub. L. No. 86-272. *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972). It should have been apparent that the seven Justices joining in the opinion in *Heublein* endorsed use of the plain statement rule to determine the reach of Pub. L. No. 86-272. *Id.*, 409 U.S. at 281-82. The Wisconsin Supreme Court should have been sensitive to the important "Federal-State balance." *Id.* The Court has reiterated most recently the need for this sensitivity. *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991) (plain statement rule used). *Gregory* for five Justices of the Court establishes a definite analytical framework for construing unclear terms of expressly preemptive law.

Having noted the foregoing, it appears that the plain statement rule can be limitedly applied in this case to the following effect. If the statutory language of Pub. L. No. 86-272 is unclear, as conceded by Wrigley,[6] then the Court should resolve any ambiguity as to congressional intent

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[6] *See* n.3, *supra*.

by adopting the reasonably permitted statutory construction that is the least intrusive. Therefore all that the plain statement rule requires here is that the Court must reverse the Wisconsin Supreme Court unless it is satisfied that (i) Pub. L. No. 86-272 has *only one* plausible congressional intent; and (ii) the *single* plausible congressional intent supports an expansive construction of the state tax exemption. If the legislative history of Pub. L. No. 86-272 additionally evidences a plausible congressional intent that supports a narrow construction of the state tax exemption, the decision of the Wisconsin Supreme Court must be reversed because Congress has not clearly spoken.

Under the plain statement rule, the Wisconsin Supreme Court must be reversed. Reversal is appropriate, because the legislative history of Pub. L. No. 86-272 is affirmatively inconsistent with Wrigley's position. One may conclude, therefore, that reliance on the plain statement rule here need not be very heavy. Yet three Justices of the Court may find even this limited utilization of the plain statement rule unacceptable. The remainder of this Argument responds to these three Justices' expressed objections.

One objection is that the plain statement rule should be used only when the question is whether the statute applies to the States at all (*i.e.*, in this context, whether the statute is intended to preempt the States). *Gregory*, 111 S.Ct. at 2409. That observation, however, did not operate in *Heublein*. It also does not seem to have affected one Justice in another case involving a clearly preemptive statute. *See Exxon Corp.* v. *Hunt*, 475 U.S. 355, 382-83 (1986) (dissenting opinion).

Distinguishing *Heublein* as involving an issue not expressly covered by Pub. L. No. 86-272 (*i.e.*, the absence of statutory language prohibiting inconsistent state alcohol regulation) is without substance. The *Heublein* Court accepted the premise that a State could not circumvent Pub. L. No. 86-272 by imposing doing business requirements that would preclude protection under Pub. L. No. 86-272. 409 U.S. at 282. The *Heublein* Court necessarily determined, therefore, whether liquor regulations were the type explicitly prohibited under this premise. In addition, determination of the preemptive reach of an ambiguous law necessarily resolves whether Congress intended preemption. To the extent that Congress does not clearly state the extent of its preemptive intent, Congress has not expressed preemption. *See* Tribe, AMERICAN CONSTITUTIONAL LAW §6-25 pp. 479-80 (2d ed. 1988).

Another objection voiced is that the rule contravenes *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, 485 U.S. 505 (1988). *Gregory*, 111 S.Ct. at 2410. This objection is surprising, because the plain statement rule is a natural corollary to the protection of federalism through the political process. Requiring the political process to speak clearly affords the political process guarantee substance. The power of Congress is not denied, because Congress can always act.

Any other approach transfers the guarantee of federalism through the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win

the case. The Commerce Clause grants Congress, and not the courts, the power to make fundamental boundary line determinations affecting federalism.[7]

In addition, the Court's use of the presumption against preemption for even expressly preemptive statutes after *Garcia* suggests some flexibility. *See Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740-41 (1985) (preemption not presumed as to unclear, but expressly preemptive, provision of the Employee Retirement Income Security Act of 1974). *But see Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U.S. 7 (1983).[8]

The final objection is that the assertion that the plain statement rule will confuse the law by unsettling prior cases that have based preemption on something other than express statutory language. *Gregory*, 111 S.Ct. at 2410. This reading of *Gregory* appears to be too expansive. If Congress does speak clearly by these indirect methods,

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[7] Newly enacted 49 U.S.C.A. 1513(f) (West Supp. 1991) well illustrates the need for requiring Congress to speak clearly. Section 1513(f) was adopted in the waning hours of the 101st Congress without any legislative history or prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact the state taxation of the air carrier industry. *See* Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N REV. 1.

[8] *Aloha Airlines* interpreted a statute that the Court determined was expressly preemptive of the type of tax in issue from the statute's plain language. *See also Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (statutory language "plainly declares the congressional purpose") and *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 370-71 (1986) (plain meaning standard applied to entire statutory scheme).

then the clear statement standard has been met. As so applied, Congress should not be any more burdened.[9]

B. Pub. L. No. 86-272 Should Be Construed With Sensitivity To Its Effect On The Operation of State Taxation of Interstate Business In Our Federal System.

How one state construes Pub. L. No. 86-272 necessarily impacts other States. The interaction suggests a court should note the effect of its decision on other States. This recognition of the principles of multistate taxation of interstate commerce in the decision matrix will further the preservation of federalism. The Court should not be viewed as the sole protector of federalism in the constitutional system. From this perspective there are several matters the Wisconsin Supreme Court should have considered.

The Wisconsin Supreme Court should have noted that the majority of States faced with the issue have interpreted the state tax exemption of Pub. L. No. 86-272 more narrowly. Additionally, the Wisconsin Supreme Court should have considered the uniformity efforts of the Multistate Tax Commission. Consideration of these factors of course would not excuse the Wisconsin Supreme Court from making the correct determination

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[9] In those rare instances where Congress is unable to state definitively the extent of its preemptive intent, it can adopt a statutory policy statement. The policy statement would inform a court as to the limit of the congressional preemptive intent.

but deviating from them would suggest that the decision is on the warning path.

Unfortunately, the Wisconsin Supreme Court was unwilling to analyze the prevailing view seriously, dismissed the Multistate Tax Commission as a "group of state revenue agents," and made no substantial attempt to identify congressional intent. The Wisconsin Supreme Court's reliance on S. Rep. 658, 86th Cong., 1st Sess., was misplaced, because it reported a bill that was different from the enacted legislation. *See* Argument III, *infra*.

The Wisconsin Supreme Court's decision has frustrated state tax uniformity. This departure from uniformity also frustrates Congress, because any congressional law that regulates state taxation *ipso facto* seeks uniformity. Closer examination of the legislative history of Pub. L. No. 86-272 would have reflected an intent not to grant a broad tax state exemption.

As is developed in Argument III, *infra*, the deletion of the sales office exemption of section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*, reflects considerable congressional sensitivity that Pub. L. No. 86-272 not unnecessarily upset market state taxation which can cause unfair competition. The decisions of the Court even during the period it construed state taxing power restrictively under the Commerce Clause display this kind of sensitivity. *See* Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617, 629 (1939); *see also Trinova Corp. v. Michigan Dept. of Treasury*, 111 S.Ct. 818 (1991) (value added in market State). A broad construction of the state tax exemption of Pub. L. No. 86-272 flies in the face of this basic policy.

The Wisconsin Supreme Court should have recognized that a broad construction of the state tax exemption of Pub. L. No. 86-272 increase the potential for no-where income. Among other things, a broad state tax exemption increases the likelihood of having increased activities (including property and payroll) in the market State that are protected by Pub. L. No. 86-272 but not by the Due Process Clause. Apart from having apportionment factors that may be attributed to a State without jurisdiction to tax, some imply there may be an issue whether Pub. L. No. 86-272 may be used by a State having jurisdiction to tax to increase the amount of income apportioned to it. *See* Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION §9:12 p. 498 (1981). The potential for using Pub. L. No. 86-272 as a tax planning tool was not lost on Wrigley (JA 7-8; T_1: 31) or its counsel. Christopher & Janaszek, *The Scope of Protected Solicitation Under Section 381 After* Wrigley, 10 J. STATE TAX. 47 (1991).

Finally, a court should recognize that any prevailing construction Congress considers wrong can be corrected by that institution. The burden of correction is appropriately placed on business, given the limited purpose Congress had with this stopgap, temporary legislation that seeks to regulate one of the most basic of state sovereign rights.

III. AN INFORMED ANALYSIS OF THE LEGISLATIVE HISTORY SURROUNDING THE DELETION OF THE SALES OFFICE EXEMPTION FROM S. 2524 INESCAPABLY LEADS TO THE CONCLUSION THAT THE STATE TAX EXEMPTION AFFORDED BY PUB. L. NO. 86-272 SHOULD BE NARROWLY CONSTRUED AND WRIGLEY HAS EXCEEDED THE LIMITS OF THIS NARROW EXEMPTION.

The Court has recognized that the breadth of the exemption for activities embraced by the statutory term "solicitation" is narrow. *Heublein*, 409 U.S. at 280, 282 and 283 (mere solicitation). The narrow scope of the protection afforded by the term "solicitation" is well illustrated in more concrete terms by consideration of the legislative history that accompanied the approval of Senator Talmadge's amendment (105 CONG. REC. 16,477 (1959)) that deleted the sales office exemption, section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*.

The sales office exemption as contained in S. 2524 protected not only a sales office maintained by the multistate business but also a sales office maintained by a in-state resident sales representative. When Senator Talmadge's amendment to strike the sales office exemption was under floor consideration in the Senate, 105 CONG. REC. 16,469-16,477 (1959), considerable effort was made to understand the effect of deleting the provision from the enacted law. The overriding consideration in deleting the sales office exemption appears to have been the preservation of market state taxation. 105 CONG. REC. 16,472 (1959) (Exchange between Senators Holland and Talmadge.)

Beyond the concern of preserving market state taxation, the Senate floor debate reflects a clear understanding that deletion of the sales office exemption would severely limit the breadth of the state tax exemption. The following noted statements of participating Senators are telling.

- Senator Talmadge, the sponsor of the amendment, in effect declared that deletion of the sales office exemption would ensure that an out-of-state company with representatives who maintained an office would be taxable. 105 CONG. REC. 16,470-16,472 (1959) (Statements of Senator Talmadge, including the observation that striking section 101(a)(3) from the bill was intended to accomplish exactly what was sought by Senator Sparkman's amendment that would have added language to the bill, 105 CONG. REC. 16,472 (1959).)

- Senator Bennett of Utah indicated that deletion of the sales office exemption of section 101(a)(3) would result in a loss of the tax exemption as soon as the out-of-state business put a sales representative in the taxing State and supplied the representative with the minimum equipment necessary to handle the business. Senator Bennett viewed section 101(a)(2), which was enacted, as permitting a business to have a representative *come in*, and section 101(a)(3) as allowing the business to have a domiciled representative with an office. 105 CONG. REC. 16,361 (1959).

- Senator Saltonstall of Massachusetts, a strong supporter of S. 2524, confirmed these understandings, 105 CONG. REC. 16,471 (1959) (The purpose of section 101(a)(2) is to allow a sales representative to *come into* a State and merely solicit orders.), as did Senator Kerr of Oklahoma, also a strong supporter. 105 CONG. REC.

16,473 (1959) (Section 101(a)(1) and (2) viewed as only allowing salesmen to come in and solicit orders and send them out of state.)

- Most importantly, Senator Byrd, the floor manager of S. 2524, concurred in these restrictive interpretations of S. 2524 following the deletion of the sales office exemption at the critical point when the Senate voted on the amended S. 2524. 105 CONG. REC. 16,493 (bill protects only traveling salesmen who do not have any facilities) and 16,494 (bill only protects a traveling salesman who goes in and sells goods subject to consummation at the home office) (1959).

The House of Representatives appears to have understood that the Senate bill was very limited in scope in its considerations of the conference report after these Senate proceedings had concluded. 105 CONG. REC. 17,770 (Statement of Rep. Celler: mere solicitation), 17,771 (Statement of Rep. Miller: very narrow, indeed) and 17,774 (Statement of Rep. Monagan: mere solicitation) (1959).

It baffles your *Amicus* in the face of this very concrete understanding, how Wrigley can argue for a broad construction of solicitation and for a *de minimis* exception for activities that clearly violate the clarity Congress sought. A mere listing of a few of the activities undertaken by Wrigley in Wisconsin make the point without the necessity of argument.

- The Wrigley representatives were in-state residents.

- At least one of the Wrigley sales managers maintained an in-state office with equipment supplied by Wrigley.

- The Wrigley representatives maintained in-state inventory which they sold and delivered in-state. *See* 105 CONG. REC. 16,355 (1959) (Statement of Senator Byrd to effect that sale of *a* [single] sample would result in the loss of the state tax exemption); section 101(a)(1) of Pub. L. No. 86-272 (delivery from out-of-state required).

- Wrigley rented warehouse space.

- The Wrigley field representatives performed services within Wisconsin by being responsible for the quality of salable inventory of retailers and stocking new stands of gum. *See* 105 CONG. REC. 16,471 (1959) (Statements of Senators Saltonstall and Talmadge to the effect that *services* not covered by S. 2524).

IV. AN APPROPRIATE STANDARD OF SOLICITATION IN LIGHT OF THE INTENT OF CONGRESS TO GRANT A NARROW STATE TAX EXEMPTION BUT STILL OFFER SOME CERTAINTY IS TO LIMIT SOLICITATION TO ACTIVITIES THAT DIRECTLY SEEK PLACEMENT OF AN ORDER OR ARE A NECESSARY PART OF SUCH ACTIVITIES.

The appropriate gloss to place on solicitation in Pub. L. No. 86-272 is suggested not only by its limited scope but also by the need to promote certainty, if possible. Your *Amicus* believes that the standard utilized by the Multistate Tax Commission to develop the Guidelines is the appropriate standard. The Guidelines achieve as much clarity as possible without expansively defining solicitation in violation of the clearly stated intent of Congress. Your *Amicus* suggests the following:

> Solicitation constitutes activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort. If an activity serves the out-of-state seller beyond the direct attempt to secure the placement of an order, the dual purpose prevents the activity from constituting only solicitation. Solicitation with respect to indirect accounts (so-called missionary activities) is similarly limited with the adjustment being that the test is applied with respect to the seeking of the placement of an order for a customer of the out-of-state seller.

Under the proposed test, Wrigley's broad activities here in issue would not constitute solicitation, because they either were too far removed from a direct seeking of the placement of an order or because they also served a purpose of Wrigley that was separate from the securing of the placement of an order. Three brief observations explain application of the proposed test.

- The sales representatives' replacement and disposition of stale and unsalable gum and stocking of new stands did not constitute solicitation, because neither activity sought the direct placement of an order. In fact, such activities also served Wrigley's independent purpose other than the direct seeking of an order. Specifically, *free* replacement of gum can hardly be viewed as seeking an order. Further, proper disposition of unsalable product rids the marketplace of defective products. Similarly, stocking of a new stand from in-state inventory effected a quick delivery of the product when a new stand was ready to open.

- The sales representatives' assistance on credit problems did not directly seek the placement of a new order. Such activities furthered Wrigley's independent interest in collecting a past due account.

- A collateral activity that is a necessary part of an activity that directly seeks the placement of an order is an activity that must occur in order to engage in solicitation. Thus, protected activities include a sales representative's maintenance of catalogues, samples, and sales literature and the commuting to and from the business being solicited.

The test proposed here by the Multistate Tax Commission is reflected in its Guidelines. Such test is rightfully a restrictive test that is consonant with the clearly expressed intent of Congress. This test is proposed as the most desirable standard to be established for the term "solicitation" under Pub. L. No. 86-272. Even the pre-sale and post-sale test being proposed by the State of Iowa is too expansive and therefore should be viewed as a next best alternative should the Court not be inclined to accept the test proposed.

CONCLUSION

For the foregoing reasons, your *Amicus* respectfully requests that the decision of the Wisconsin Supreme Court be reversed. In reversing the decision of the Wisconsin Supreme Court, the Court should indicate that the state tax exemption of Pub. L. No. 86-272 is to be narrowly construed and that consistent with that limitation the appropriate test of solicitation is whether the activities of the out-of-state company directly seek the placement of an order or are a necessary part thereof.

Respectfully submitted,

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November 21, 1991

APPENDIX

RESOLUTION OF THE MULTISTATE TAX COMMISSION ADOPTING THE PUB. L. NO. 86-272 GUIDELINES

WHEREAS, it is in the interest of effective tax administration for tax administrators from time to time to examine their practices as to their application of nexus standards to out-of-state business organizations with respect to various state taxes; and

WHEREAS, the information regarding such practices, if made generally available to tax administrators, may result in increased uniformity in the states' practices with regard to various nexus issues; and

WHEREAS, the four primary goals of the Multistate Tax Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoid duplicative taxation; and

WHEREAS, the state members of the Commission have earlier reviewed their practices with regard to the application of nexus standards relating to sales and use taxation; and

WHEREAS, the state members of the Commission now believe that it is in the best interest of promoting the four primary goals of the Commission to describe generally their practices with regard to Public Law 86-272 and state income taxation; and

WHEREAS, the adoption of a document containing such information describing the states' practices under Public Law 86-272 is one method by which to make generally available such information relating to those practices;

NOW, THEREFORE, the Multistate Tax Commission hereby **RESOLVES** that a document to be entitled "Information Concerning Practices of Multistate Tax Commission States Under Public Law 86-272" be published by the tax administrators of the Multistate Tax Commission states which impose a corporate income tax setting forth information concerning the practices of said states in applying Public Law 86-272 to various factual circumstances; and

BE IT FURTHER RESOLVED, that any member state, if it so desires, may accept, in whole or in part, said document and may otherwise dissent from any statements contained therein, so that said document shall best reflect the present practices of the states in applying Public Law 86-272; and

BE IT FURTHER RESOLVED, that said document be reviewed no less than once every three years by each of the signatory states to confirm that its statement of practice is accurate; and, if not, said state shall amend the document with regard to any such inaccuracy; and

BE IT FURTHER RESOLVED, that it is the intent of this Resolution: (1) that the contemplated document is to be informational only concerning each state's practices in regard to Public Law 86-272 and is not to serve as a basis upon which any person may rely as to a nexus conclusion

with respect to any particular set of factual circumstances; and (2) that that person should inquire of the particular state for information as to that state's position concerning that specific set of factual circumstances.

BE IT FURTHER RESOLVED, that the Uniformity Committee of the Multistate Tax Commission place upon its agenda the issue of whether to promulgate a uniform regulation in this regard to be proposed for adoption by the member states.

Dated this 21st day of June, 1985

Multistate Tax Commission

PUBLIC LAW 86-272 GUIDELINES

[The Multistate Tax Commission has adopted the following guideline for use by its member states in determining whether a corporation has a taxable nexus within a state's borders for income tax purposes. It adopted this guideline under the title "Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272." It invites all states to adopt this guideline.]

Public Law 86-272, 15 U.S.C. 381-384, (hereafter "P.L. 86-272") restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. For the purposes of this document, the term "net income tax" shall also include a franchise tax

measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to legislative limitations, to the fullest extent constitutionally permissible. Therefore, it is also the policy of those states to construe the provisions of P.L. 86-272 narrowly so as to apply that law to only those limited circumstances clearly and reasonably intended by Congress. The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered either immune or not immune from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another signatory state for purposes of applying a throwback rule (if applicable) with respect to such sales.

I

NATURE OF PROPERTY BEING SOLD

Only the sale of tangible personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, intangibles or any other type of property is not immune from taxation by reason of P.L. 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

II

SOLICITATION OF ORDERS

For the in-state activity to be immune, it must be limited solely to *solicitation* (except for that activity conducted by independent contractors described in Section III below). If there is any other activity unrelated to solicitation, the immunity shall be lost. Examples of activities presently treated by the signatory states (unless otherwise stated as an exception or addition) as either non-immune or immune are as follows:

A. *Non-Immune Activities*:

The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.

12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining a sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:
    a. Repair shop.
    b. Parts department.
    c. Purchasing office.
    d. Employment office.
    e. Warehouse.
    f. Meeting place for directors, officers, or employees.
    g. Stock of goods.
    h. Telephone answering service.
    i. Mobile stores, i.e., trucks with driver salesmen.
    j. Real property or fixtures of any kind.
17. Consigning tangible personal property to any person, including an independent contractor.
18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in-home or otherwise).

19 Conducting any activity in addition to those described in paragraph II.B. below which is not an integral part of the solicitation of orders.

B. *Immune Activities*:

The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying samples only for display or for distribution without charge or other consideration.
3. Owning or furnishing autos to salesmen.
4. Passing inquiries and complaints on to the home office.
5. Incidental and minor advertising, i.e., notice in a newspaper that a salesman will be in town at a certain time.
6. Missionary sales activities.
7. Checking of customers' inventories (for reorder, but not for other purposes).
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

III

INDEPENDENT CONTRACTORS

P.L. 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent contractors may engage in the following limited activities in the state without the taxpayer's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the principal shall remove the immunity.

IV

MISCELLANEOUS PRACTICES

A. *Interstate Commerce.*

The only activity in the state must be in interstate commerce. If there is any other activity (except that described in II.B. or otherwise incidental to solicitation), then the immunity shall be lost.

Requisites are:

1. Approval of the sales *must* be made outside the state (except for sales by independent contractors).
2. Deliveries *must* be made from a point outside the state.

B. *Incorporated*

The immunity afforded by P.L. 86-272 does not apply to any corporation incorporated within the taxing state.

C. *Service vs. Sale*

Sales of services are not immune under P.L. 86-272. If a sale consists of a mixture of tangible personal property and services, the immunity shall be lost. Examples of such a mixture are:

1. Photographic development.
2. Fabrication of customer's materials.
3. Installation of equipment.
4. Architectural and engineering services.

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

No. 91-119 (7)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF WISCONSIN DEPARTMENT OF REVENUE

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November 21, 1991.

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WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE CITY OF NEW YORK

Interest of the Amicus Curiae

Pursuant to Rule 37.5, the City of New York, as a political subdivision of the State of New York, is exercising the right to file a brief amicus curiae in support of the position of the Wisconsin Department of Revenue.

The City's interest in the case stems from the fact that similar questions of tax liability arise under tax laws which it imposes. The City imposes a tax based on the net income of a corporation. N.Y.C. Administrative Code, Title 11, ch. 6, subch.2. The State of New York authorized the imposition of this City tax. N.Y. Laws 1966, ch. 722. The City also imposes an unincorporated business net income tax. N.Y.C. Admin. Code, Title 11, Ch. 5. This also was authorized by New York Laws of 1966, chapter 772.

Facts Relied on

We adopt the statement of relevant facts as stated in the opinion of the Wisconsin Supreme Court. Wrigley v. Dept. of Rev., 160 Wis. 2d 53, 465 N.W.2d 800 (1991). We rely also on those facts as more fully developed in the opinion of Wisconsin's intermediate appellate court, the Court of

Appeals. 53 Wis.2d 559, 451 N.W.2d 444 (1989).

ARGUMENT

A PROPERLY APPORTIONED NON-DISCRIMINATORY INCOME TAX MAY BE IMPOSED BY A STATE OR CITY IN WHICH TANGIBLE PERSONAL PROPERTY IS SOLD BY DELIVERY ACROSS INTERSTATE BOUNDARIES, WHERE THE ACTIVITIES OF THE VENDOR IN THAT STATE OR CITY GO BEYOND MERE SOLICITATION OF ORDERS.

a. The federal law and its background

(1)

Public Law 86-272, codified in 15 U.S.C. 381, was enacted in 1959. In effect, it bars a State or a political subdivision thereof from imposing a net income tax on income derived in the State by any person from interstate commerce "if the only business activities" within the State are either: (1) "the solicitation of orders" for sales of tangible personal property with the orders sent outside the State "for approval

or rejection" and with the approved order "filled by shipment or delivery" from a point outside the State, or

(2) the solicitation of orders in the name of or for the benefit of a prospective customer of such person if the orders when filled are in accordance with the requirements of paragraph (1).

Thus, the bar against imposition of a net income tax applies "only" when all that occurs in the State is "solicitation" with orders accepted or rejected outside the State and with delivery of the goods ordered, shipped or delivered from outside the State. The law narrowly confines the prohibition, and its history shows a clear intent to so confine it.

(2)

The language limiting the prohibition in the statute is clear and unambiguous. This makes it unnecessary to consider the

background or history leading to its enactment. We shall, however, review it to show that an extremely narrow restriction was intended.

In Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959), this Court upheld income taxes imposed by two States on net income from exclusively interstate operations of foreign corporations. In one State the taxed corporation engaged in a regular and systematic course of solicitation with the orders being subject to acceptance, filling and delivery from its plant outside the taxing State. In the taxing State it leased an office, equipped with its own furniture and fixtures, which was used by one salesman, another salesman, who was a district manager, and a secretary. Two additional salesmen used the office as a clearing house. Two cars were furnished to these salesmen. The salesmen also received

and transmitted to their employer claims for loss or damage in any shipments.

In the other State the vendor had salesmen, who carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders, as well as promoting the business and good will of the vendor. It also had an office for one salesman and a full-time secretary. Other than office equipment, supplies or advertising literature and the like, the vendor had no property in the State. All orders were subject to approval by the out of state home office and were shipped from there on an "f.o.b. warehouse basis."

In the first paragraph of this Court's opinion, the Court said (358 U.S. at 452):

> "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming

sufficient nexus to support the same."

In Brown-Forman Distill. Corp. v. Collector of Revenues, 234 La. 651, 101 So.2d 70 (1958), a Kentucky distilling corporation was held subject to a Louisiana income tax on its income from that State. The distiller's activities in Louisiana consisted of having "missionary men", who called on wholesale dealers and who, on occasion, accompanied salesmen of these wholesalers to assist them in obtaining orders from retail dealers. An appeal was taken to this Court. It was dismissed and, treating it as a petition for certiorari, the petition was denied. Brown-Forman v. Collector of Revenue, 359 U.S. 28 (1959).

In light of the decisions in the Northwestern case, the sentence in the opinion which we have quoted, and the refusal of this Court to review the Louisiana case, businesses began to fear that the long

established rule that a tax could not be imposed simply because drummers or salesmen came into the taxing state was about to be overruled. They lobbied Congress for a law designed to prevent that from happening. As a result, Public Law 86-272 was enacted.

(3)

The Senate Report on the bill which was enacted and the Conference Report on it prepared by managers on the part of the House of Representatives are more readily found in the 1959, Volume 2, of the United States Code Congressional and Administrative News at pages 2548 to 2561.

The Senate Report, at the outset, states that the bill is designed to deal with the problem arising by reason of the Northwestern case, and it also refers to the refusal to review the Brown-Furman case in Louisiana. It pointed out that businesses

were afraid that "mere solicitation of orders [would] be regarded as a local activity forming a sufficient 'nexus' with the State" to permit the imposition of taxes (p.2551).

The Report made it clear that the bill was designed to prevent mere solicitation from becoming the sole basis for imposing the tax. In its "DETAILED DESCRIPTION OF COMMITTEE'S BILL", it repeats, at least four times, that the exemption or immunity from the tax applies "only" or "merely" where all that is done in the State is solicitation (pp. 2552, 2553, 2554). The bill, however, treats a sales office in the State of the sale as a part of solicitation (p. 2553). It states that the immunity granted will not be available if the business activities by salesmen are not limited to the solicitation of orders, and it goes on to note that it will not be available "where the orders are filled by a shipment or delivery from a stock of

goods, warehouse, plant, or factory maintained by the person within the State (p. 2553).

(4)

The short conference report prepare by managers for the House of Representatives also emphasizes that the bill is designed to give immunity "where the only business activity within the State by the out-of-State company was solicitation" (p.2560).

(5)

The use of the word "only" to describe the solicitation which will grant immunity in the statute enacted, therefore, follows the intent of the drafters of the bill.

b. **The claimed "de minimis" extension of the immunity.**

The vendor concedes that its activities in Wisconsin were not "only" the solicitation of orders, but urges that the additional activities were "de minimis" or trifles. It cannot be denied that every rule of law and

every statute may be subject to a "de minimis" exception. Where, however, the statute provides immunity if the "only" activity is solicitation, a de minimis exception would apply solely to the most inconsequential activity. The extreme limit of what would be regarded as inconsequential is indicated not only by the language of the statute, but by the intent of its drafters.

It should be noted that the statute specifies certain exceptions to the mere solicitation limitation. Thus, neither the use of an independent contractor to make sales nor the maintenance of an office used solely for making sales or soliciting orders is to be treated as removing the exemption [15 U.S.C. §381(c)]. Specifying these activities and mentioning no others indicates how very slight any possible de minimis exception would have to be. This is also shown by the requirement that, in addition to mere

solicitation, the "orders are [to be] sent outside the State for approval or rejection" and must be "filled by shipment or delivery from a point outside the State" [15 U.S.C. §381 (a)(1)].

The drafters indicated that conduct going beyond solicitation would not be protected by the immunity being granted. They stated that it "will not be available to a person, however, if the business activities by salesmen within the State" are not limited to the "solicitation" of orders (p. 2553). It was noted that, while the immunity would extend to the use of a sales office, it would not be available if its primary purpose and use were other than for sales purposes (pp. 2553-2554). The Report repeatedly states that the exemption applies only where the sole activity in the State is solicitation or the use of an independent contractor or sales office, but it goes on to state that

whether any other activity constitutes a basis for imposing the tax is left "for future determination by the Congress, or in the absence of congressional action, by the courts" (p. 2554).

The Wisconsin Supreme Court, in part, escaped "de minimis" by ruling that any activity incidental to or inextricably bound to solicitation was to be treated as solicitation; still other activities were treated as de minimis (465 N.W.2d at 811). The definition of solicitation ascribed by the Wisconsin Court flies in the face of the terms of the statute. If the intent had been to treat activities incidental or inextricably bound to solicitation as being covered by that term, it would be inconsistent with the explicit statement that, for the exemption to apply, the orders must be sent out of the State for approval or rejection and that they must be filled by shipment or delivery from

a point outside the State. Both such matters are incidental to or inextricably bound to solicitation. Where matters relating to solicitation were to be given the exemption, the law specifically so provided, as in the case of independent contractors or sales offices.

Even if, despite all of the indications of the limited nature of the exemptions, de minimis could be applied, it could reasonably be used only where the exception was extremely minimal. Moreover, where there are a number of activities which, if treated individually, might be regarded as de minimis, the aggregation of these activities falls in a different category. Otherwise the "only" restriction in the statute limiting it to solicitation would become meaningless.

Here we have the following activities which have been treated as either an element

of solicitation or as de minimis by the Court below:

> Replacement of stale gum by stock in the hands of the salesmen;
>
> Sales of gum and its immediate transfer to fill racks when making "agency stock checks;"
>
> Regular and periodic training seminars held in Wisconsin;
>
> Maintaining product displays both as to location and design;
>
> Recommending hiring, firing and raises by a regional manager in Wisconsin;
>
> Involvement in credit transactions by regional manager;
>
> and the rental of some storage space in Wisconsin for several months to store a representative's car and supplies (each representative carried a supply of gum with a wholesale value of approximately $1000).

These activities in Wisconsin exceeding mere solicitation, especially when taken together, cannot be disregarded as de minimis or trifling under a law which limits the exemption to those whose sole activity in

the State is "only" solicitation. The limited nature of the exemption does not have to rest on any canon of statutory construction. It is called for by the terms of the statute and the clear intention shown by its history.

There is no sound basis for treating the listed activities as simply "solicitation." Since the sole aim of a vendor of tangible goods is to sell those goods, any activity in the selling state, no matter how extensive, could, under such an interpretation, be deemed merely an element of solicitation.

The only relevant definition of "solicit" in Webster's Third New International Dictionary reads as follows:

> "to make petition to: ENTREAT, IMPORTUNE (to the king for relief): esp: to approach with a request or plea (as in selling or begging) **."

The statute itself, especially when read in light of its history, makes clear that the

term "solicitation" was not intended to be so broadly interpreted.

c. **Additional reasons showing that the immunity provision does not apply.**

(1)

Although Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972), the only case decided by this Court involving Public Law 86-272, involves a somewhat different issue, the opinion emphasizes the limited nature of the exemption from State tax which the statute provides. The Court pointed out, quoting from an earlier case, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." (pp. 281-282)

(2)

To treat the exemption as extending to any activity which advances or assists in the sale of goods would not only expand the

narrow limits of the law, but would go far beyond the stated intent of the drafters. Instead of preventing an interstate seller from being disadvantaged, it would give him a tremendous advantage over a local manufacturer or wholesale vendor. The interstate vendor would escape the income tax placed on local industry even though he went beyond mere salesmanship in the State and acted, so far as customers are concerned, as though all activities relating to them were the same as those of local sellers.

(3)

The case of Gillette Co. v. Tax Comm., 56 AD2d 475 (1977), affd., 45 NY2d 846 (1978), is in no way inconsistent with our position. In that case the vendor had no property in New York other than salesmen's samples. The ground on which the tax was imposed was the vendor's efforts to induce

sales by advising retailers (who do not buy directly from Gillette Co. but from wholesalers who buy from them) with regard to "display techniques" (56 AD 2d at pp. 481-482). The New York court concluded that "some sort of calls upon direct accounts was expressly anticipated and condoned by the statute" (ibid.).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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November 21, 1991.

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(8)

No. 91-119

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Wisconsin

BRIEF OF AMICI CURIAE ON THE MERITS IN SUPPORT OF WISCONSIN DEPARTMENT OF REVENUE BY THE STATE OF IOWA AND THE STATES OF ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT AND VIRGINIA

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.3, the signatory states submit this brief as Amici Curiae in support of the Appellant, Wisconsin Department of Revenue, and ask this Court to reverse the decision of the Wisconsin Supreme Court. Because this brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

II. INTEREST OF AMICI CURIAE

At issue in this case is the proper interpretation of a federal statute commonly referred to as Public Law 86-272 (codified at 15 U.S.C. § 381). This federal statute restricts a state's right to impose a net income tax, as defined in 15 U.S.C. § 383, on income derived within such state and, therefore, is applicable to the Amici because they impose such taxes.

The signatory Amici states impose either net income taxes or franchise taxes measured by net income which are implicated by P.L. 86-272. The Amici believe that the Wisconsin Supreme Court's decision in this case incorrectly interprets P.L. 86-272. They desire a decision from this Court as to the proper legal standards to be employed in application of the statute.

III. RELEVANT STATUTE

Public Law 86-272 (15 U.S.C. § 381) provides, in relevant part:

Minimum Standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the *only* business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the *solicitation of orders* by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the *solicitation of orders* by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Domestic corporations: persons domiciled in or residents of State

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Sales or solicitation of orders for sales by independent contractors

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

Definitions

(d) For purposes of this section –

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

(emphases added).

IV. SUMMARY OF ARGUMENT

The Wisconsin Supreme Court erroneously interpreted Public Law 86-272 in such a way that it immunizes from a state net income tax an out-of-state company which does almost anything and everything in a state except own certain types of physical facilities in the state. In enacting P.L. 86-272, Congress did not intend to so drastically restrict states' right to impose taxes. The plain language of the statute immunizes only those companies whose *"only* business activities" are the "solicitation of orders." The orders must be approved or rejected out-of-state and filled by shipment or delivery from out-of-state. The statute cannot properly be interpreted so broadly as to immunize all activities "closely associated and inextricably bound up with 'solicitation of orders' " or to immunize de minimis nonsolicitation activity. The legislative history of the statute supports the narrow construction of the statute, consistent with the common ordinary meanings of "only" and "solicitation of orders."

The standards adopted by the Wisconsin Supreme Court lead to uncertainty for taxpayers and tax administrators. In contrast, the pre-sale/post-sale test is a definite standard with the benefits of predictability and certainty. It immunizes those customary or generally accepted acts which lead to the placing of orders, but not those acts which occur as a result of prior sales or other acts (such as training) which may have an impact on future orders.

The broad interpretation of "solicitation of orders" adopted by the Wisconsin Supreme Court results in consequences never intended by Congress. It causes an

extreme and unfair loss of revenue for the taxing states, especially consumer states. Also, local business suffers a competitive handicap because it must pay more tax to make up for the lost tax base. The typical small business paying tax to its state of domicile will not be able to compete with large multistate operators who pay no state income tax where they sell their products. The statute does not clearly dictate these unfair consequences.

V. ARGUMENT

This is a statutory construction case involving a federal statute which immunizes from a state net income tax certain persons who would otherwise be subject to the tax. Public Law 86-272 becomes relevant only if a person's activities in a state (solicitation and nonsolicitation) subject that person to the state's net income tax pursuant to state statutes and taxation is not prohibited by a constitutional provision.[1]

---

[1] Some language of the Wisconsin Supreme Court indicates that the court was thinking in terms of the Commerce Clause. It refers to "a burden on interstate commerce" that "would 'tend to "balkanize the American economy." ' " *William Wrigley, Jr. Co. v. Dept. of Rev.*, 465 N.W.2d 800, 812 (Wis. 1991). It also quoted the dissenting opinion of the Wisconsin Tax Appeals Commission's Order which said that the direct sales made by Wrigley in Wisconsin were not sufficient "to stick jurisdiction on Wrigley." *Id.* at n.5. Clearly, however, under the Commerce Clause, Wrigley is subject to Wisconsin's income tax. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

The Wisconsin Supreme Court stated that when analyzing a claimed immunity under 15 U.S.C. § 381 (the codification of P.L. 86-272), "a court should look at whether the activities are closely associated and inextricably bound up with 'solicitation of orders.' " *Wrigley*, 465 N.W.2d at 811. The court further stated that courts should analyze deviations from the norm and "de minimis" nonsolicitation activities to see if they reach a sufficient level of activity to result in loss of immunity. *Id.* It also stated that courts should look at what is ***not done*** in a state in deciding whether activities done are "solicitation of orders." *Id.*

The standards adopted by the Wisconsin Supreme Court are inconsistent with the plain language of the statute and are not supported by the statute's legislative history. Application of the Wisconsin Supreme Court's standards will result in a great deal of uncertainty on the part of taxpayers and tax administrators, as well as causing dire consequences for the states and their domestic corporations which were never intended by Congress when it enacted P.L. 86-272.

As this Court pointed out in a case involving § 381, " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.' " *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 281-82 (1972), *quoting United States v. Bass*, 404 U.S. 336, 349 (1971). Therefore, § 381 should not be interpreted to restrict the traditional state power to impose taxes any more than is consistent with the clear language of the statute. Moreover, § 381 is a tax exemption statute. It should, therefore, be construed strictly against the assertions of the taxpayer and in favor of the

taxing power, with the taxpayer having the burden of clearly establishing the right to an exemption. 3 Norman J. Singer, *Sutherland Statutory Construction* § 63.08 (Sands rev. 4th ed. 1986). "As explained in court opinions: 'Exemptions from taxation claimed under legislative acts should be rigidly construed and established beyond a reasonable doubt. It is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear and unequivocal terms that a claim to an exemption can be maintained.' " 3A Norman J. Singer, *Sutherland Statutory Construction* § 66.09 (Sands rev. 4th ed. 1986) (footnote citations omitted).

If Congress had intended to immunize Wrigley's Wisconsin activities consisting of picking up products, disposing of products, training, stocking displays, rental of storage space, delivery of products from car stock, and managerial activities, it certainly could, and would, have used words with a broader reach than "solicitation of orders." Congress did not say "solicitation of orders and activities incidental to solicitation." It did not say "business activities." It did not say "activities closely associated and inextricably bound up with solicitation of orders." All activities of all out-of-state (and all in-state) merchants are directed toward ultimately increasing sales, whether they be "solicitation" or nonsolicitation. Congress did not, however, state that nonsolicitation activities that could increase sales were covered by the tax immunity in P.L. 86-272 or that out-of-state merchants could not be required to pay state income tax. The fact that Wrigley's activities in Wisconsin may "eventually result in increased orders . . . does not blanket all [Wrigley] activities with the protection afforded by [P.L.

86-272]." *Clairol, Incorporated v. Kingsley*, 262 A.2d 213, 218 (N.J. Super. Ct. App. Div. 1970), *aff'd*, 270 A.2d 702 (N.J. 1970), *appeal dismissed for want of a substantial federal question*, 402 U.S. 902 (1971).

The language of P.L. 86-272 does not allow a company to be immune from a state's net income tax if its nonsolicitation activities are "de minimis." "Public Law 86-272 provides for no 'exceptions' to the solicitation only requirement for the statute to provide an exemption from taxation." Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 384-85 (1976). Public Law 86-272 expressly exempts from a state's net income tax a corporation whose *"only* business activities" within the state are the "solicitation of orders." The term "only" means "nothing else or more." Black's Law Dictionary 982 (5th ed. 1979). Even an isolated activity beyond the scope of "solicitation" precludes P.L. 86-272 tax immunity. This view is supported by legal commentators who have criticized those courts which have said that de minimis nonsolicitation activity does not preclude immunity. *See* Philip M. Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 294, 305 (Winter 1985) ("This de minimis definition of solicitation is without legislative support."); Paul J. Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 381 (1976) ("[I]t is most difficult to believe that the de minimis doctrine properly has any application whatsoever in this type situation."). This particular case does not involve an isolated activity beyond solicitation of orders. There are a multitude of

nonsolicitation activities by Wrigley employees in Wisconsin. Any ***one*** of those activities is sufficient to preclude tax immunity. "[I]t is not the quantity of activity that determines whether the federal statute is a shield against state income tax liability. The statutory prohibition on taxation is determined by the quality of the activity; specifically, activity which is limited to the solicitation of the sale of tangible personal property." *Amway Corp., Inc. v. Director of Revenue*, 794 S.W.2d 666, 670 (Mo. banc 1990). It is "not the frequency of the visits or volume of sales" which is important, but "the *nature* of [Wrigley's] activities." *U.S. Tobacco Co. v. Martin*, 801 S.W.2d 256, 260 (Ark. 1990).

"The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)." *Heublein*, 409 U.S. at 279. *Northwestern States Portland Cement* involved two separate appeals consolidated for decision. The normal, limited meaning of "solicitation" is made apparent by its use in the Court's statement of facts concerning the second company:

> Respondent's salesman carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders . . . and the promotion of business and goodwill for respondent.

358 U.S. at 456. Solicitation of orders is only one aspect of "sales activities"; promotion of business and promotion of goodwill are separate aspects. The Supreme Court used "solicitation" in its common and ordinary sense. It must be presumed that Congress, reacting to the Court's language, did likewise.

The plain language of § 381 is sufficient to settle the questions presented in this case. Therefore, the statute's legislative history should only be looked at to determine whether there is a clearly expressed legislative intention contrary to the statutory language which would require the Court to question the strong presumption that Congress expresses its intent through the language it chooses. *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). The legislative history of § 381 does not show a legislative intent contrary to the statutory language. In fact, "[t]he legislative history of § 381 shows that Congress had rather *limited purposes*. . . ." *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 279 (1972) (emphasis added). It strongly supports the narrow construction of "solicitation of orders."

In *Heublein*, 409 U.S. at 279-80, the Court stated:

> The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U.S., at 452. Congress promptly responded to the "considerable concern and uncertainty" and the "serious apprehension in the commercial community" generated by this decision by enacting Pub. L. 86-272, 73 Stat. 555, 15 U.S.C. § 381, within seven months.
>
> In this statute, Congress attempted to allay the apprehension of businessmen that *"mere solicitation"* would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax. Section 381 was designed *to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal.*

(footnotes omitted; emphases added).

The Wisconsin Supreme Court's interpretation of § 381 does not "define clearly a lower limit" for the exercise of the state's power to tax or "remove uncertainty" for businessmen or for tax administrators. Under the Wisconsin Supreme Court's standards, one must determine whether activities are sufficiently "closely associated and inextricably bound up with 'solicitation of orders.' " *Wrigley*, 465 N.W.2d at 811. Also, for those activities recognized even by the Wisconsin Supreme Court as nonsolicitation activities, one must determine whether the amount of nonsolicitation is greater than "de minimis." *Id.* These standards are fraught with uncertainty. Is replacement of a product (such as stale or damaged gum) immunized but not repairs? One court that adopted a broad interpretation of "solicitation" indicated that repairs would not be immunized. *Gillette Co. v. State Tax Commission*, 393 N.Y.S.2d 186, 191 (N.Y. App. Div. 1977), *aff'd*, 410 N.Y.S.2d 65 (N.Y. 1978). How are repairs significantly different from replacing the product? If company personnel do ***only*** complaint handling, is the activity not "solicitation" and not immunized? If while at a

customer's location doing complaint handling, the company representative also solicits another order, does the complaint handling then become "solicitation?" How will business people or tax administrators know where to "draw the line" when considering which activities are closely associated and inextricably bound up with solicitation of orders or how much nonsolicitation is beyond the de minimis level? Apparently, the Wisconsin Supreme Court considered almost everything the Wrigley sales representatives and their managers did in Wisconsin to be within the tax exemption. It did indicate that it would not view the occasions when credit problems were looked into as being part of solicitation. *Wrigley*, 465 N.W.2d at 811. But why would disposing of stale gum in Wisconsin landfills be any more closely associated with solicitation of orders than is looking into credit problems? The Wisconsin Supreme Court stated that the type of business and the manner in which its products are sold must also be considered. *Id.* at 812. Do tax administrators have to become experts on how different types of products are sold by different types of businesses? Who decides what is customary for a particular type of business or product?[2]

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[2] Public Law 86-272 does not apply to a company which sells a ***service***, as compared to tangible personal property, so why assume every company which sells tangible personal property must be able to come within the statute's protection? "[M]any businesses, by their very nature, cannot claim the benefits of the federal statute. . . . " *Olympia Brewing Co. v. Dept. of Rev.*, 5 Or. Tax 99, 110 (Or. T.C. 1972), *aff'd*, 511 P.2d 837 (Or. 1973), *cert. denied*, 415 U.S. 976 (1974). In *Heublein*, the type of business and the manner of sales for a liquor manufacturer in South Carolina were such that liquor manufacturers could never qualify for P.L. 86-272 tax immunity. 409 U.S. at 279.

In contrast to the uncertainty created by the standards adopted by the Wisconsin Supreme Court, the pre-sale/post-sale test is a definite and efficient standard to apply in determining whether an activity constitutes "solicitation of orders." The Wisconsin Supreme Court even recognized that "the pre-sale/post-sale test may produce consistency and predictability." *Wrigley*, 465 N.W.2d at 809. It immunizes the customary or generally accepted acts which lead to the placing of orders, but not those acts which occur after a sale has been made. Activities done before the sale which are attempts to get a prospective customer to order the product being sold are within P.L. 86-272 immunity. Examples of such pre-sale activities include demonstrating how the product works, answering questions regarding pricing or warranties, leaving product brochures or samples to be tried by the prospective customer, or even telling the prospective customer how the product might be resold if the customer purchased it. Once the sale has been made, however, the post-sale activities are not included in "solicitation of orders." Picking up or disposing of damaged or outdated products, making repairs or replacing product, handling complaints with respect to product defects or regarding billing or delivery, stocking displays or shelves, and training or advising the customer regarding merchandising of products already purchased are examples of activities which are done in connection with ***prior*** sales, i.e., as a result of earlier solicitations of orders. Although they may promote business or goodwill, they are not part of the "solicitation of orders." They relate to "maintaining an on-going business operation" and "help[ing] run [customers'] businesses," which are not

immunized by P.L. 86-272. *National Tires, Inc. v. Lindley*, 426 N.E.2d 793, 798 (Ohio Ct. App. 1980). Public Law 86-272 does not immunize every activity which may affect future sales in some way. Managerial activities, such as training and evaluating sales representatives, may affect future sales, in that better trained employees should make more sales. There is no reason, however, why Wrigley must train its employees in Wisconsin in order to solicit orders there. Indeed, managerial activities do not even directly involve the prospective customer.

In *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972), the taxpayer was required by South Carolina statutes regulating intoxicating liquor to send its products to its local representative in South Carolina who then transferred the products to a local wholesaler which had placed orders with the taxpayer at its out-of-state home office. "This transfer occurred within the State and clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381." *Id.* at 279. Because the in-state transfer was required by South Carolina as a condition of conducting business within the state, it could be said to be closely associated and inextricably bound up with "solicitation of orders." If the in-state transfer was not done, orders could not be solicited in South Carolina. Yet, this Court held that such activity was not solicitation under P.L. 86-272. The Wisconsin Supreme Court's interpretation of P.L. 86-272 is plainly inconsistent with *Heublein*. The fact that the type of product, the level of competition and the level of sales desired may require that Wrigley employees do certain activities does not cause those activities to be immunized by P.L. 86-272.

Wrigley does not even satisfy the statutory requirement that orders be approved outside the state and filled by shipment or delivery from a point outside the state. Wrigley sales representatives conducted "agency stock checks." *Wrigley*, 465 N.W.2d at 804. They used car stock, carried as inventory on Wrigley's books, to fill in empty spots on retail shelves or stands, so that the retailer would not have to wait for delivery from a wholesaler. Wrigley's Chicago office then billed the wholesaler who, in turn, billed the particular retailer. The wholesaler also replaced the sales representative's supply of product with the amount which had been left with a retail account. *Id.* This activity constituted acceptance of an order and delivery within Wisconsin. The representative did not obtain approval from anyone outside Wisconsin each time he left gum with an account, for which the account was ultimately billed. This transfer of product within the State "clearly was neither 'solicitation' nor the filling of orders 'by shipment or delivery from a point outside the State' within the meaning of § 381." *See Heublein*, 409 U.S. at 279.

By having their stock of gum replenished by in-state wholesalers, Wrigley representatives were able to operate just as effectively as if Wrigley maintained its own stock of goods within Wisconsin. As the Wisconsin Supreme Court recognized (465 N.W.2d at 807), immunity is not provided if the company maintains a warehouse or stock of goods within the state. S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548. The Wisconsin Supreme Court dismissed Wrigley's rental of "storage space in a warehouse" as not being "the size or type of warehouse" not immunized by § 381. *Wrigley*, 465

N.W.2d at 805, 812. Do tax administrators now have to do further guessing and line drawing to determine when a company's in-state warehouse is of the type and size which allows the state to impose a net income tax on the company? Also, when is an in-state office not the type and size of office which causes a company to lose its § 381 immunity? Two Wrigley regional sales managers lived in Wisconsin and worked out of their homes. Wrigley provided the file cabinet for the "in-home office." *Wrigley*, 465 N.W.2d at 805. "[I]n actuality the homes of these [employees] were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices'." *See General Motors Corp. v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987). A provision of P.L. 86-272 which would have immunized the maintenance of a "sales office" within the state was stricken by an amendment prior to enactment. *See* 105 Cong. Rec. 16470 (1959); S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548.

The overly broad interpretation of "solicitation of orders" adopted by the Wisconsin Supreme Court "not only results in unfair loss of revenue to the taxing States, but local business suffers a competitive handicap since it must shoulder the tax burdens which the out-of-state seller has unfairly escaped by reason of Public Law 86-272." Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 9:14, at 517-18 (1981). The broad interpretation used by the Supreme Court of Wisconsin allows an out-of-state company to do practically anything in a state that a local company would do (generating greater income than could be made simply through solicitation of

orders), and benefit from the same state services as the local company, but not pay any tax to the state to help pay for those services. The local company is not protected by P.L. 86-272, and if the state cannot tax out-of-state companies, local companies have to carry a greater share of the tax burden. The typical small business, domiciled in and taxed upon its profits by a state, will not be able to compete with a large multistate operator who pays no state income taxes where he sells his products.

Remarks made by Senator Byrd, sponsor of the bill (S. 2524, 86th Cong., 1st Sess. (1959)) which, after amendment, was passed as P.L. 86-272, support the narrow view of what restrictions the statute places on states' power to impose income taxes. Near the end of the senate debate on S. 2524, after the relevant amendments had been made, Senator Byrd stated:

> Mr. President, all in the world the bill would do is to say that business which originates from the solicitation of a *traveling salesman, who does not have an office* and who does not have any facilities whatever, except perahaps (sic) his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. That is all the bill would do. It has been stripped down to the point that that is *the only thing the bill would do.*
>
> . . . .
>
> Let me say a word about small business. The Senator from Alabama is interested in the protection of small business. *Big business can get*

> *orders by advertising* over the television and in the newspapers. Big business concerns spend millions of dollars advertising on the television and in newspapers. Frequently the small businessman must send a salesman in to get the business.
>
> What about the orders which are obtained by mail order houses? Should such transactions be taxed? The *mail order houses send a booklet into the State,* and the recipient notes from that book what he wants to buy. *All that the small businesses can do is to send in salesmen. They have no office. They do no business in the State, except to solicit orders.*

105 Cong. Rec. 16493-16494 (1959) (emphases added).

The committee report which accompanied S. 2524 stated:

> Consequently, if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.

S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2548, 2553.

There are no statements in legislative committee reports regarding S. 2524 or made during the congressional debates which support the interpretation of P.L. 86-272 adopted by the Wisconsin Supreme Court. There are no statements that activities incidental to or closely associated with solicitation are protected by P.L. 86-272. There are no statements that the statute protects any activity which is a customary activity ultimately increasing sales or that some amount of nonsolicitation activity is protected.[3]

Taxpayers arguing in favor of a de minimis exception to P.L. 86-272 sometimes cite to the Willis Report (H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964)), which refers to certain activities not immunized by P.L. 86-272 as being "usual or frequent." This report was written by a subcommittee of the House Judiciary Committee in 1964, five years after P.L. 86-272 was enacted. The subcommittee's interpretation of a statute enacted five years earlier is not part of the legislative history of the statute and should not be given any weight in ascertaining the legislative intent when the statute was passed. 2A Norman J. Singer, *Sutherland Statutory Construction* § 48.06 (Sands rev. 4th ed. 1984); *Secretary of Interior v. California,* 464 U.S. 312, 330 n.15 (1984).

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[3] There are statements made in committee reports or debate regarding the need for an office, salable inventory, warehouse, or other place of business in the state in order for a company to lose its immunity. Such statements are, however, clearly erroneous. Bills introduced in Congress which would have prevented states from imposing an income tax on a business unless it maintained an office, salable inventory, warehouse or other place of business, or had an agent who maintained an office or other place of business in the state were rejected. *See* H.R. Rep. No. 936, 86th Cong., 1st Sess. (1959) (reporting H.J. Res. 450); S.J. Res. 113, 86th Cong., 1st Sess. (1959).

VI. CONCLUSION

Public Law 86-272 immunizes from an otherwise proper state net income tax those companies whose "only" activities in the state are the "solicitation of orders." There is no exception for de minimis nonsolicitation. "Solicitation of orders" includes only those pre-sale activities which are customarily done in order to persuade a prospective customer to order the product being sold. It does not include post-sale activities, such as dealing with previously sold product or handling complaints related to prior sales. It also does not include activities, such as management and training, which do not even directly involve the prospective customer.

The Amici urge this Court to reverse the decision of the Wisconsin Supreme Court. That decision applied an unreasonably broad interpretation of P.L. 86-272's restrictions on state taxing power which is not supported by the plain language of the statute or by the statute's legislative history.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court of Wisconsin

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER, BY THE STATE OF NEW JERSEY AND THE STATES OF ALASKA AND ARKANSAS

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INTEREST OF AMICI CURIAE

The signatory States submit this brief as *Amici Curiae* in support of the Petitioner, Wisconsin Department of Revenue, because we believe that the Wisconsin Supreme Court's overbroad interpretation of a federal statute, 15 *U.S.C.* §381, commonly known as Public Law 86-272 (hereinafter "P.L. 86-272"), will result in loss of state tax revenues. All of the signatory States have enacted net income taxes or franchise taxes measured by net income which are impacted by P.L. 86-272. Unless this Court reverses the Wisconsin Supreme Court's expansion of the state income tax exemption created by P.L. 86-272, the States face reduced revenues and numerous claims for refunds of taxes previously collected from multistate firms. The signatory States, therefore, respectfully urge this Court to adopt a strict construction of P.L. 86-272, thereby assuring that multistate businesses pay their fair share of the tax revenue required to support state and local governments.

SUMMARY OF ARGUMENT

In *Clairol, Inc. v. Kingsley*, 109 *N.J. Super.* 22, 262 *A.*2d (App. Div. 1970), aff'd 57 *N.J.* 199, 270 *A.*2d 702 (1970), *appeal dismissed for want of a substantial federal question*, 402 *U.S.* 902 (1971), the New Jersey courts adopted what is widely recognized as a strict construction of the term "solicitation of orders," thereby affirming the limited scope of the state income tax exemption created by Public Law 86-272. The legislative history of the statute fully supports the conclusion of the New Jersey courts, and

other state courts, that the statute was meant to protect *only* the solicitation of orders; a firm that conducts any other in-state business activities, even those which may eventually lead to increased sales, is properly subject to state taxation. This strict interpretation of the statutory language is consistent with this Court's traditional rules for the construction of tax exemption statutes, and with the principles of federalism.

ARGUMENT

CONTRARY TO THE LEGISLATIVE HISTORY OF PUBLIC LAW 86-272, THE WISCONSIN SUPREME COURT ENLARGED THE FEDERAL STATUTORY PROHIBITION ON STATE NET INCOME TAXATION IN PUBLIC LAW 86-272 BEYOND THE MERE SOLICITATION OF ORDERS.

The Wisconsin Supreme Court erred in its broad interpretation of Public Law 86-272* in *William Wrigley, Jr.*

* The federal statute at issue in this case, Public Law 86-272, provides in pertinent part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if *the only business activities within such State* by or on behalf of such person during such taxable year are either, or both of the following:
>
> (1) *the solicitation of orders* by such person, or his representative, in such State for sales of tangible

(Continued on following page)

Co. v. Dept. of Revenue, 160 *Wis.*2d 53, 465 *N.W.*2d 800 (1991). The Wisconsin Tax Appeals Commission had found that Wrigley representatives engaged in various business activities in Wisconsin which exceeded the exempt "soliciation of orders." These activities included setting up displays, replacing stale products, direct sales of gum, maintaining home offices, renting storage space and conducting training seminars. *Id.* at 811. Reversing the Tax Appeals Commission, the Wisconsin Supreme Court has enlarged the P.L. 86-272 exemption to encompass all of these activities, finding that Wrigley's activities were all "incidental to the solicitation of orders of gum" or were "so minor as to be *de minimus*." *Id.*

The Wisconsin Court's expansive construction of this federal statute is in direct conflict with a decision of the New Jersey Supreme Court. *Clairol, Inc. v. Kingsley*, 109 *N.J. Super.* 22, 262 *A.*2d 213 (App. Div. 1970), aff'd 57 *N.J.* 199, 270 *A.*2d 702 (1970), *appeal dismissed*, 402 *U.S.* 902 (1971). In that case, the New Jersey court held, and this Court confirmed through its dismissal of the appeal for want of a substantial federal question,* that P.L. 86-272

(Continued from previous page)

> personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State. . . . [15 *U.S.C.* §381(a); emphasis supplied].

* This Court has previously held that such a dismissal of a case is a disposition on the merits when the case arises under the Court's appellate jurisdiction. *Hicks v. Miranda*, 422 *U.S.* 332, 344 (1975); *Mandel v. Brady*, 432 *U.S.* 173, 176 (1977). The Wisconsin Supreme Court refused to follow *Clairol* in its construction of the federal statute.

should be construed *narrowly* so that it would not insulate corporate activities which go beyond the mere solicitation of orders. *Clairol, supra,* 109 *N.J. Super.* at 28-29; 262 *A.*2d at 217.* *Clairol* expressly rejected the contention, apparently

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* The *Clairol* decision is generally recognized as embodying a strict construction of the statutory language. *Hervey v. AMF Beaird, Inc.*, 250 *Ark.* 147, 464 *S.W.*2d 557, 562 (1971); *Wrigley, supra,* 451 *N.W.*2d at 488; Tatarowicz, State Judicial and Administrative Interpretations of U.S. Public Law 86-272, 38 *Tax Lawyer* 294, 317 (1985); *Ringgold Coal Mining Co. v. Taxation Div. Director,* 4 *N.J. Tax* 321, 333 (Tax Ct. 1982). This strict constructionist approach to P.L. 86-272 has been followed by many state courts around the country. *Sjong v. Alaska State Dept. of Revenue,* 622 *P.*2d 967 (Alaska 1981), *appeal dismissed* 454 *U.S.* 1131 (1982); *U.S. Tobacco Co. v. Martin,* 304 *Ark.* 119, 801 *S.W.*2d 256 (1990); *Hervey v. AMF Beaird, Inc.*, 250 *Ark.* 147, 464 *S.W.*2d 557 (1971); *Drackett Products Co. v. Conrad,* 370 *N.W.*2d 723 (N.D. 1985); *National Tires, Inc. v. Lindley,* 68 *Ohio App.*2d 71, 426 *N.E.*2d 793 (1980); *Herff Jones Company v. State Tax Comm.*, 217 *Or.* 404, 430 *P.*2d 998 (1967). However, the following state courts have interpreted the statutory exemption quite broadly. *Ind. Dept. of Revenue v. Kimberly-Clark Corp.*, 275 *Ind.* 378, 416 *N.E.*2d 1264 (1981); *Deseret Pharm. Co., Inc. v. State Tax Comm.*, 579 *P.*2d 1322 (Utah 1978); *U.S. Tobacco Co. v. Comm.*, 478 *Pa.* 125, 386 *A.*2d 471, *cert. denied,* 439 *U.S.* 880 (1978); *Gillette Company v. State Tax Commission,* 56 *A.D.*2d 475, 393 *N.Y.S.*2d 186 (1977), aff'd, 410 *N.Y.S.*2d 65, 382 *N.E.*2d 764 (1978); *Coors Porcelain Company v. State,* 183 *Colo.* 325, 517 *P.*2d 838 (1973), *cert. denied,* 419 *U.S.* 874 (1974); *State v. State Tax Commission,* 382 *S.W.*2d 645 (Mo. 1964).

An "intermediate" interpretation or "pre-sale/post-sale" test, was applied in *Wrigley* by the Wisconsin Court of Appeals, *William Wrigley, Jr. Co. v. Wis. Dept. of Rev.*, 153 *Wis.*2d 559, 451 *N.W.*2d 444, 452 (Wis. App. 1989); *see also Miles Laboratories, Inc. v. Dept. of Revenue,* 274 *Or.* 395, 546 *P.*2d 1081, 1083 (1976); *Chattanooga Glass Co. v. Strickland,* 244 *Ga.* 603, 261 *S.E.*2d 599, 600-601 (1979).

accepted by the Wisconsin Supreme Court in *Wrigley,* that all in-state activities which eventually lead to increased orders are encompassed under the umbrella of "solicitation of orders." *Compare, Clairol, supra,* 109 *N.J. Super.* at 30, 262 *A.*2d at 218, with *Wrigley, supra,* 465 *N.W.*2d at 811. Under the strict New Jersey approach, various "pre-sale activities" carried on by multistate firms such as Wrigley, including stocking product displays and taking inventory of retailers' stock, exceed the solicitation of orders because the multistate company is directly assisting local retailers in maintaining their in-state business operations. *Clairol, supra,* 109 *N.J.Super.* at 28-30, 262 *A.*2d at 217; *Accord, National Tire, Inc. v. Lindley,* 68 *Ohio App.*2d 71, 426 *N.E.*2d 793, 798 (1980); *U.S. Tobacco Co. v. Martin,* 304 *Ark.* 119, 801 *S.W.*2d 256, 259 (1990).

New Jersey's strict interpretation of P.L. 86-272 is firmly supported by the statute's legislative history. Shortly after this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 *U.S.* 450 (1959), hearings were held and bills were hurriedly introduced in Congress to reverse that decision in response to an outcry from the multistate business community. P.L. 86-272, in the form initially introduced in the Senate (S. 2524), would have curtailed the taxing power of the States far more than the law as finally enacted. What is now P.L. 86-272 originally included a third paragraph which would have extended the tax exemption to insulate:

> The maintenance and operation by such person, or by his representative, in such state of an office the primary purpose and use of which is to serve representatives of such person who are engaged in the solicitation of orders described

> in paragraph (1) or (2), or both, and to receive, process, and forward such orders. [105 *Cong. Rec.* 16,355 (1959)].

This original bill, however, met with very stiff opposition on the floor of the Senate led by Senators Gore, McCarthy, Sparkman and Talmadge. The main concern expressed was that the bill, designed principally to relieve small and medium-sized firms from the costs of complying with the tax laws of any state in which they engaged in only minimal soliciting activity, would be taken advantage of by large corporations with substantial activities in market states, thus disadvantaging domestic businesses and depriving the States of a significant revenue source.* Senator Gore pointed out that the bill would place small, local businesses at a competitive disadvantage relative to large manufacturers selling throughout the country:

> Just what does this bill do? Briefly, it prevents the States from taxing companies which sell their products within the States so long as the companies limit their activities to maintaining a sales office and combing the State with salesmen. This means that a New York manufacturing company can go into Georgia and compete with Georgia manufacturers, or with companies which maintain branch plants or warehouses in Georgia, and pay no State income taxes. The Georgia company must pay taxes for both, or else the individual citizens of Georgia must make up the difference.

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* Senator Neuberger of Oregon also expressed his State Tax Commission's concern about substantial loss of state revenue had the original bill been enacted. 105 *Cong. Rec.* 16,494 (1959).

> The short range effects of this bill will be felt by the consuming States of the South and West. Small businesses in these areas will suffer unfair competition from out-of-state companies. Warehouses and branch plants will be closed in these areas as the larger companies consolidate their activities. [105 *Cong. Rec.* 16,360 (1959)].

Senator McCarthy expressed a similar concern:

> Presented in the name of a bill to protect small business, it will establish a situation in which a foreign corporation – that is, a corporation established in another State from that State which attempts to impose the tax – may very well have an advantage by way of tax differential. [105 *Cong. Rec.* 16,376 (1959)].

As a result of this dissatisfaction with the bill as originally introduced, Senator Talmadge proposed an amendment to delete paragraph 3, 105 *Cong. Rec.* 16,470 (1959), which was passed by the Senate. 105 *Cong. Rec.* 16,477 (1959). It appears to have been the intent of Congress in deleting paragraph 3 to lessen the restriction of P.L. 86-272 upon the States' power to tax interstate business. As Senator Hillard of Florida stated:

> It seems to me that the Senator from Georgia [Senator Talmadge] not only has the correct idea in offering his amendment, but that his idea is in the interest of the preservation of the right of States to decide according to their own sovereign pleasure, whether they wish to resort to state income taxation. [105 *Cong. Rec.* 16,472 (1959)].

The fact that P.L. 86-272 in its final form, after the Talmadge floor amendment, provided far *less* protection to interstate business interests compared to the broad scope

of the original bill, was commented upon forcefully on the Senate floor by Senator Byrd, Chairman of the Senate Finance Committee, who had been one of the original bill's strongest supporters:

> [A]ll in the world the bill would do is to say that business which originates from the solicitation of a traveling salesman, who does not have an office and who does not have any facilities whatever, except perhaps his own automobile or his own legs, which business originates in one State when title is transferred in another State, since the sale is not consummated in the State involved, is business which shall not be taxed, as interstate commerce, in regard to income taxes. *That is all the bill would do. It has been stripped down to the point that that is the only thing the bill would do.* [105 *Cong. Rec.* 16,493 (1959); emphasis supplied]

As S. 2524 was substantially modified before passage, the Wisconsin Supreme Court placed excessive reliance upon the Senate Committee's report on the *original* bill. *Wrigley, supra,* 465 *N.W.*2d at 807-8 & 812. P.L. 86-272 *as enacted* provides, and was intended to provide, far less protection to interstate business interests than the bill as originally reported out of the Senate Finance Committee. The floor amendments responded to the concerns of the Committee *minority* who warned against "curtailing the ability and choice of the States to raise sufficient revenue to carry out proper and necessary State functions." S.Rep. No. 658, 86th Cong., 1st Sess.; Minority Views, 1959 *U.S. Code Cong. & Admin. News,* p. 2557. Thus, the Wisconsin Supreme Court's expansive interpretation of the term "solicitation of orders" in P.L. 86-272 is contrary to the legislative intent.

Given this legislative history, the term "solicitation of orders" in P.L. 86-272 is most properly construed narrowly, as in *Clairol.* There is no basis whatsoever in the statute for the Wisconsin Supreme Court's holding that any type or amount of business activity other than solicitation of orders qualifies for the exemption from state income tax under P.L. 86-272. As the Supreme Court of Missouri stated in *Amway Corp., Inc. v. Director of Revenue,* 794 *S.W.*2d 666 (Mo. banc 1990), "it is not the *quantity* of activity that determines whether the federal statute is a shield against state income tax liability. The statutory prohibition on taxation is determined by the *quality* of the activity." *Id.* at 670; emphasis supplied. The prohibition on imposition of the state net income tax is applicable if the corporation's "*only* business activity" within the State is the solicitation of orders. 15 *U.S.C.* §381(a); emphasis supplied. Had Congress intended to permit interstate companies to conduct some small amount of other business in the State yet preserve the state income tax prohibition, less absolute statutory language could have been employed. For instance, Congress might have granted the exemption where the "primary" or "predominant" business activity was solicitation of orders.*

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* As originally proposed, S. 2524 included a paragraph permitting maintenance of "an office the *primary purpose* and use of which is to serve representatives of such person who are engaged in solicitation of orders." 105 *Cong. Rec.* 16,355 (1959). This paragraph was deleted by floor amendment. 105 *Cong. Rec.* 16,477 (1959). Surely, if *any* activities in addition to solicitation of orders were to be protected, Congress could have retained the "primary purpose" language in some form, rather than deleting it in full.

Furthermore, a narrow judicial construction of P.L. 86-272 is fully appropriate because the statute imposes a unique Congressional limitation on the States' fundamental power to raise tax revenue. This Court has frequently held that any state statute which grants exemption from state or local taxes should be strictly construed. *Wright v. Nagle*, 101 *U.S.* 791 (1879); *Bank of Commerce v. State of Tenn.*, 109 *U.S.* 493 (1881); *Hoge v. Richmond & D.R. Co.*, 99 *U.S.* 348 (1878):

> The power of taxation is an attribute of sovereignty and is essential to every independent Government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit no other reasonable construction. [*Id.* at 353].

Since P.L. 86-272 creates an unusual federal exemption from state taxation, general principles of comity and federalism call for a strict construction by the judiciary. While this Court has retreated from judicial invocation of the 10th Amendment to shield traditional state functions from federal initiatives under the Commerce Clause, *Garcia v. San Antonio Metro Transit Authority*, 469 *U.S.* 528 (1985), the Court should narrowly interpret a federal statute that restricts state sovereignty in so important an area as the raising of revenue. As this Court stated when considering the impact of P.L. 86-272 on an otherwise valid state regulatory scheme:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. [*Heublein v. South Carolina Tax Com.*, 409 *U.S.* 275, 281 (1972) quoting *United States v. Bass*, 404 *U.S.* 336, 349 (1971)].

Here, the Wisconsin Supreme Court's expansive construction of P.L. 86-272 has dismantled the compromise between protection of interstate commerce and preservation of state revenue sources which was forged in Congress during the passage of P.L. 86-272. The States look to this Court to restore the balance through a strict construction of the statute.

CONCLUSION

The Amici States respectfully request that this Court reverse the decision of the Wisconsin Supreme Court and hold that P.L. 86-272 does not prohibit the Wisconsin Department of Revenue from collecting the Wisconsin franchise tax against William Wrigley, Jr. Company.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

No. 91-119

In The

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October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In attempting to fairly apportion otherwise taxable income from sales of tangible personal property within their boundaries by foreign corporations, how are the "solicitation" and "delivery" requirements in Pub. L. No. 86-272 to be applied by state taxing authorities in the face of conflicting decisions from state courts of last resort as to whether those requirements admit of a *de minimis* exception and as to whether "solicitation" encompasses post-sale activities "incidental" to the canvassing of retail customers.

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BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Multistate Tax Commission is the administrative arm of the Multistate Tax Compact (the "Compact"). ALL ST. TAX GUIDE ¶701 *et seq.* (Max. Mac. 1991); ST. TAX GUIDE ¶351 (CCH 1991). Nineteen States, including the District of Columbia, have adopted the Compact. In addition, fourteen States are associate members. The Compact seeks to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. Article I, Compact, ALL ST. TAX GUIDE ¶701 (Max.

Mac. 1991), ST. TAX GUIDE ¶351 (CCH 1991). The Court recognized the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The Compact was developed by cooperation among States and taxpayers in response to the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1 and 23. Specifically, member States of the Compact are committed to strengthening Our Federalism by resolving the inherent conflict of our federal form of government that presupposes both a single national economy and States with separate taxing authority. The member States of the Commission have accepted the challenge of federalism by developing uniform state tax rules of apportionment and allocation.

In furtherance of uniformity, the Multistate Tax Compact utilizes the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A UNIFORM LAWS ANNOTATED 331 (West 1985), as the core rules for the apportionment and allocation of income of a multijurisdictional business. Article IV, Compact, ALL ST. TAX GUIDE ¶711 (Max. Mac. 1991), ST. TAX GUIDE ¶351 (CCH 1991). The Multistate Tax Commission has further developed regulations interpreting UDITPA. *See* MTC Regs., ALL ST. TAX GUIDE ¶600 *et seq.* (Max. Mac. 1991). Fostering state tax uniformity through voluntary state cooperation remains central to the Commission.

The Commission's uniformity effort relevant here is its Public Law 86-272 Guidelines, ALL ST. TAX GUIDE ¶789 (Max. Mac. 1991), ST. TAX GUIDE ¶370a (CCH 1991)

("Guidelines").[1] The Guidelines reflect the Commission's best understanding of congressional intent as expressed in Pub. L. No. 86-272. Consonant with the Commission's understanding of Tenth Amendment jurisprudence,[2] the Guidelines embraced a narrow interpretation of the state tax exemption so that the exemption would apply only in "those limited circumstances clearly and reasonably intended by Congress." App. 4.

The Multistate Tax Commission invited all states to adopt the Guidelines. App. 3. The Wisconsin Tax Appeal Commission accepted the invitation. Pet. for Cert. A-249 - A-253. From the undisputed facts of this case it seems clear that Wrigley's activities would violate several of the thresholds of the Guidelines. The Wisconsin Supreme Court surprisingly forewent application of the Guidelines by adopting an expansive interpretation of the state tax exemption. The Wisconsin Supreme Court's decision is surprising because it occurs in the face of the complaining taxpayer's characterization of Pub. L. No. 86-272 as unclear.[3]

By foregoing the Guidelines, the Wisconsin Supreme Court has unnecessarily frustrated the States' goal of preserving state tax jurisdiction to the maximum extent possible in the face of the requirements of, and the

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[1] The Guidelines as well as the Commission's adopting resolution are reproduced in the Appendix.

[2] *See South Carolina* v. *Baker*, 485 U.S. 505, 510 n.4 (1988).

[3] *See* Pet. Wrigley Br. before the Wisconsin Supreme Court at 14, 16-17. In contrast, Petitioner Wisconsin Department of Revenue argues that Pub. L. No. 86-272 is unambiguous. *See* Arguments I.C. and D. of Pet. for Cert.

policies reflected in, the U.S. Constitution and applicable federal law. The Wisconsin Supreme Court's decision also disconcertingly undermines the uniformity that the Multistate Tax Commission sought. The Wisconsin Supreme Court failed to recognize the opportunity and responsibility that States have to strengthen federalism through voluntary cooperative action.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court reached its erroneous determination because it failed to apply the Tenth Amendment jurisprudence of the Court and failed to be sensitive to the effect that its decision would have on the operation of all state tax systems. The Tenth Amendment jurisprudence of the Court and sensitivity to multistate taxation counsel that the state tax exemption of Pub. L. No. 86-272 be construed very limitedly to avoid unnecessary intrusion on the traditional state sovereignty. The Wisconsin Department of Revenue must prevail either if the legislative history of Pub. L. No. 86-272 clearly supports the taxing jurisdiction of the States or if the legislative history is unclear. Wrigley may prevail only if there is a *single* clear statement from Congress that supports an expansive state tax exemption.

Wrigley cannot satisfy the plain statement rule standard, because it is clear from the legislative history of Pub. L. No. 86-272 that Congress did not intend to do anything more than to protect mere solicitation as a stopgap, temporary measure. Congress was unwilling to do anything further until it had studied state taxation of

interstate commerce. *See* Title II of Pub. L. No. 86-272. Even if Wrigley is able to cite snippets of legislative history in its favor, such isolated references do not overcome the clear statements of Congress to the contrary.

The most appropriate construction of "solicitation" in Pub. L. No. 86-272 is that it is limited to those activities that directly seek the placement of an order and those collateral activities that are a necessary part of such activities. There is no room within the narrow construction of solicitation to allow activities that indirectly promote the sales business of a seller of tangible personal property in interstate commerce or to ignore activities clearly exceeding solicitation as *de minimis*. The member States of the Commission do not support as their primary position any relaxation of this very restrictive standard. Even the possible use of a pre-sale and post-sale test, as suggested by the State of Iowa, should be viewed as a next-best alternative to the position here stated.

ARGUMENTS

I. THE RELATIONSHIP OF PUB. L. NO. 86-272 TO STATE TAX APPORTIONMENT.

Understanding the relationship of Pub. L. No. 86-272 and the state tax rule for the apportionment of income derived from an interstate business should aid the review of this case. References are given to applicable provisions of the laws of the States of Wisconsin and Illinois (the State in which Wrigley based its operations), as they existed in the 1970's, and UDITPA, which has remained unchanged since its adoption by the National Conference

of Commissioners on Uniform State Laws in 1957.[4] Ill. Rev. Stat. ch. 120, §3-304 (1975); Wis. Stat. §71.07 (1973-1977); UDITPA §1, *et seq*. The basic understanding of the rules of apportionment have not changed substantially.

Income of a business engaged in interstate commerce is attributed to the various States which have contributed to its realization by the use of formula apportionment. Formula apportionment determines the actual apportionment factor that is used to attribute the income of a multijurisdictional business to each taxing State. The form of formula apportionment in most prevalent use among the States is a formula based upon three factors: the property factor, the payroll factor and the sales factor. The specific apportionment factor of each taxing State is determined by averaging the ratios of the in-state component to the everywhere component of the property, payroll, and sales of the business. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §9. The resulting apportionment factor is then applied to the income of the multistate business to determine how much of the income of the entire business is attributable to and taxable by each taxing State. As is subsequently explained, attribution of business income arising from sales of tangible personal property made in interstate commerce by the use of formula apportionment (which has the potential, depending upon the circumstances,

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[4] Only four States employ income tax statutes that differ widely from UDITPA. Warren, *Principles of Formulary Apportionment*, THE STATE & LOCAL TAX PORTFOLIO SERIES ¶200, ¶205 p. 207 (1989) ("Warren").

either to benefit or to disadvantage a taxpayer) is restricted to companies that are "taxable" in more than a single State.

The basic rules for determining the numerators and denominators of the ratios of the three factors are as follows. The denominators of each factor are equal to the total amount of the respective factors everywhere, *i.e.*, total property, total payroll and total sales. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A), 2(A), and 3(A) (1975); Wis. Stat. §71.07(2)(a)1., (b)1., and (c)1. (1973-1977); UDITPA §10, 13, and 15. The numerators of each factor are determined by reference to the extent of the presence of each respective factor in the taxing State, whether that State is the base State or another State. Thus, the numerator of the property factor for a State apportioning the income of a multistate business is equal to the amount of property present in that State. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A) (1975); Wis. Stat. §71.07(2)(a)1. (1973-1977); UDITPA §10. The numerator of the payroll factor is equal to the amount of payroll that is attributed to the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(A) (1975); Wis. Stat. §71.07(2)(b)1. (1973-1977); UDITPA §13. Payroll is generally attributable to the taxing State if the employee performs all of his/her services in the taxing State or all, but incidental, services in the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(i) and (ii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(a) and (b). Special rules apply if the employee performs more than incidental services outside the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(iii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(c). Sales for purposes of determining the numerator of the sales factor of the taxing

State are sitused on a destination basis, *i.e.*, on a basis of the State to which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16. Unlike the property factor and the payroll factor, the sales factor has a throwback provision. The throwback provision of the sales factor attributes sales that otherwise would be attributed to a State in which the multistate business is not "taxable" to the State from which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B)(ii) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16(b). Taxability for purposes of the sales factor throwback rule is defined in terms of jurisdiction to tax, including consideration of the effect of Pub. L. No. 86-272. *Id.*

As earlier noted, use of formula apportionment to attribute the income of a business engaged in interstate commerce is restricted. Formula apportionment is used only when the multistate business is "taxable" in more than a single State. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §2. If a business is not taxable in more than a single State, all the income of a multistate business is attributed to the single State in which the business is taxable. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(1) (1973-1977) (special allocation rules applied); UDITPA §2. A business is deemed taxable in another State when that other State has jurisdiction to impose a tax, regardless of whether the other State does in fact impose an income tax. Ill. Rev. Stat. ch. 120, §3-303(f) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §3. As is the case under the sales throwback rule, Pub. L. No. 86-272 is used to determine the extent to which a multistate business is taxable in

another State in the jurisdictional sense for purposes of determining eligibility to use formula apportionment. Thus, to the extent Pub. L. No. 86-272 bars a State from imposing an income tax, a business will not be treated as being subject to an income tax in the other State.

Because of differing state tax rates and other features of state income taxes, one cannot generalize whether a multistate business will desire to be subject to income tax in more than a single State. To illustrate this point, if a multistate business is based in a State with a high income tax rate, that business may wish to apportion its income out of the base State to another State with a low income tax rate or with no income tax in order to decrease the amount of income that is subject to tax in the base State. Conversely, if the base State has no income tax or a low income tax rate, the business may not wish to apportion its income out of the base State in order to preserve the advantage of this lower tax burden in the base State.

An aggressive taxpayer based in a State with a low income tax rate may still wish to be subject to income tax in at least one other State, however. The reason for desiring taxability in at least one additional State stems from the fact that a taxpayer will thereby be permitted to apportion its income by using the three apportionment factors, property, payroll, and sales, to determine its taxable income in the base State. Because only the sales factor has a throwback provision, a taxpayer *may believe* it can lessen its overall tax burden by being able to attribute some of its income to States in which it has property and payroll but is not subject to tax. *See* Warren, *supra* n.4 at ¶230.6 p. 224. Thus, to the extent a business has payroll

and/or property located in other States in which it is *not* subject to tax, the aggregate of the numerators of the payroll and property factors in the States in which it is subject to tax will be less (and the resulting aggregate state taxable income and state tax will be less). This possibility arises because specific items of property and payroll that are sitused to States not having the jurisdiction to tax are not thrownback to any other State in which the business is subject to tax. This result, if it is obtainable through carefully tax planning, is known as creating "nowhere income," income that is not taxable by any State because of the operation of the apportionment factors. If the multistate business were only taxable in the base State and was not taxable in at least one other State, the business would be ineligible to apportion its income and would be subject to tax on one hundred percent of its income in the base State.

It should be clear from this review that the result obtained from the use of Pub. L. No. 86-272 to determine whether a multistate business is taxable in another State (and hence subject to the use of formula apportionment) is directly affected by whether the state tax exemption of that law is narrowly or expansively construed.[5]

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[5] Litigated cases involving Pub. L. No. 86-272 can illustrate the point. *Compare U.S. Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978) (taxpayer wins with broad construction), *with Coors Porcelain Co.* v. *State*, 183 Colo. 325, 517 P.2d 838, *cert. denied*, 419 U.S. 874 (1974) (taxpayer loses with broad construction); *compare also Miles Laboratories, Inc.* v. *Dept. of Revenue*, 274 Or. 395, 546 P.2d 1081

(Continued on following page)

Although one cannot generalize about the revenue affect of a narrow or a broad construction of the state tax exemption of Pub. L. No. 86-272, this fact does not make the operation of Pub. L. No. 86-272 potentially any less intrusive upon the state sovereign taxing power. This is plainly apparent from the fact that Pub. L. No. 86-272 has the potential to prohibit the State into which the goods are sold (*i.e.*, the market state) from taxing a multistate enterprise that would otherwise be subject to tax under the Due Process Clause and the Commerce Clause. *See Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). An extreme example illustrates the point: A business based in a single State can sell all of its goods into another State and yet avoid any liability for income tax in the market State if it carefully limits its activities in the market State to mere solicitation. Even if the circumstances of the example are not so extreme, the intrusive nature of Pub. L. No. 86-272 is embodied in the fact that Pub. L. No. 86-272 allows goods to be sold into a market State by a multistate business that will not necessarily be subject to the market State's income tax. The intrusive nature of Pub. L. No. 86-272 is further observed in Argument II.B., *infra*.

(Continued from previous page)

(1976) (taxpayer seeks narrow construction to attribute income to State with no income tax) *with U.S. Tobacco Co.* v. *Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990) (taxpayer loses with narrow construction). It should also be noted that when a taxpayer has a loss, the taxpayer's objectives are likely to be achieved with treatment that is the opposite of what the taxpayer would want if the taxpayer has income.

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS ERRONEOUS, BECAUSE THAT COURT'S CONSTRUCTION OF PUB. L. NO. 86-272 WAS NOT INFORMED BY THE JURISPRUDENCE OF THE TENTH AMENDMENT WHICH REQUIRES CONGRESS TO STATE CLEARLY THE EXTENT TO WHICH STATE TAXATION IS PREEMPTED AND BY THE REQUIREMENTS OF MULTISTATE TAXATION IN OUR FEDERAL SYSTEM THAT INSTRUCT SENSITIVITY TO OTHER STATE TAXING SYSTEMS.

The impression left by the Wisconsin Supreme Court's analysis of Pub. L. No. 86-272 is one of an isolated jurisdiction wrestling with the construction of a statute that could easily have been passed by the State's own legislature instead of a statute passed by Congress that regulates state taxation of interstate commerce in our federal system. Specifically, the Wisconsin Supreme Court's decision in this case is devoid of any consideration of the rule of construction that applies to unclear congressional legislation that preempts fundamental state sovereign powers and of the effect that the construction of Pub. L. No. 86-272 would have on other state tax systems. This erroneous interpretative stance precipitated the Wisconsin Supreme Court's misinterpretation of Pub. L. No. 86-272.

A. The Jurisprudence of the Tenth Amendment Requires Pub. L. No. 86-272 Be Interpreted In A Manner That Is The Least Intrusive On The State Sovereign Taxing Power While Remaining Faithful To The Clearly Expressed Intent Of Congress.

The assumption of this alternative argument is that Pub. L. No. 86-272 cannot be interpreted by the plain

meaning of its statutory language and that resort to the collateral indications of congressional intent is required. Under the Court's Tenth Amendment jurisprudence, this statutory construction environment does not license a state supreme court to surmise congressional intent. Rather, the Wisconsin Supreme Court should have been informed that "Congress had rather limited purposes" in enacting Pub. L. No. 86-272. *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972). It should have been apparent that the seven Justices joining in the opinion in *Heublein* endorsed use of the plain statement rule to determine the reach of Pub. L. No. 86-272. *Id.*, 409 U.S. at 281-82. The Wisconsin Supreme Court should have been sensitive to the important "Federal-State balance." *Id.* The Court has reiterated most recently the need for this sensitivity. *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991) (plain statement rule used). *Gregory* for five Justices of the Court establishes a definite analytical framework for construing unclear terms of expressly preemptive law.

Having noted the foregoing, it appears that the plain statement rule can be limitedly applied in this case to the following effect. If the statutory language of Pub. L. No. 86-272 is unclear, as conceded by Wrigley,[6] then the Court should resolve any ambiguity as to congressional intent

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[6] *See* n.3, *supra*.

by adopting the reasonably permitted statutory construction that is the least intrusive. Therefore all that the plain statement rule requires here is that the Court must reverse the Wisconsin Supreme Court unless it is satisfied that (i) Pub. L. No. 86-272 has *only one* plausible congressional intent; and (ii) the *single* plausible congressional intent supports an expansive construction of the state tax exemption. If the legislative history of Pub. L. No. 86-272 additionally evidences a plausible congressional intent that supports a narrow construction of the state tax exemption, the decision of the Wisconsin Supreme Court must be reversed because Congress has not clearly spoken.

Under the plain statement rule, the Wisconsin Supreme Court must be reversed. Reversal is appropriate, because the legislative history of Pub. L. No. 86-272 is affirmatively inconsistent with Wrigley's position. One may conclude, therefore, that reliance on the plain statement rule here need not be very heavy. Yet three Justices of the Court may find even this limited utilization of the plain statement rule unacceptable. The remainder of this Argument responds to these three Justices' expressed objections.

One objection is that the plain statement rule should be used only when the question is whether the statute applies to the States at all (*i.e.*, in this context, whether the statute is intended to preempt the States). *Gregory*, 111 S.Ct. at 2409. That observation, however, did not operate in *Heublein*. It also does not seem to have affected one Justice in another case involving a clearly preemptive statute. *See Exxon Corp.* v. *Hunt*, 475 U.S. 355, 382-83 (1986) (dissenting opinion).

Distinguishing *Heublein* as involving an issue not expressly covered by Pub. L. No. 86-272 (*i.e.*, the absence of statutory language prohibiting inconsistent state alcohol regulation) is without substance. The *Heublein* Court accepted the premise that a State could not circumvent Pub. L. No. 86-272 by imposing doing business requirements that would preclude protection under Pub. L. No. 86-272. 409 U.S. at 282. The *Heublein* Court necessarily determined, therefore, whether liquor regulations were the type explicitly prohibited under this premise. In addition, determination of the preemptive reach of an ambiguous law necessarily resolves whether Congress intended preemption. To the extent that Congress does not clearly state the extent of its preemptive intent, Congress has not expressed preemption. *See* Tribe, AMERICAN CONSTITUTIONAL LAW §6-25 pp. 479-80 (2d ed. 1988).

Another objection voiced is that the rule contravenes *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, 485 U.S. 505 (1988). *Gregory*, 111 S.Ct. at 2410. This objection is surprising, because the plain statement rule is a natural corollary to the protection of federalism through the political process. Requiring the political process to speak clearly affords the political process guarantee substance. The power of Congress is not denied, because Congress can always act.

Any other approach transfers the guarantee of federalism through the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win

the case. The Commerce Clause grants Congress, and not the courts, the power to make fundamental boundary line determinations affecting federalism.[7]

In addition, the Court's use of the presumption against preemption for even expressly preemptive statutes after *Garcia* suggests some flexibility. *See Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740-41 (1985) (preemption not presumed as to unclear, but expressly preemptive, provision of the Employee Retirement Income Security Act of 1974). *But see Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U.S. 7 (1983).[8]

The final objection is that the assertion that the plain statement rule will confuse the law by unsettling prior cases that have based preemption on something other than express statutory language. *Gregory*, 111 S.Ct. at 2410. This reading of *Gregory* appears to be too expansive. If Congress does speak clearly by these indirect methods,

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[7] Newly enacted 49 U.S.C.A. 1513(f) (West Supp. 1991) well illustrates the need for requiring Congress to speak clearly. Section 1513(f) was adopted in the waning hours of the 101st Congress without any legislative history or prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact the state taxation of the air carrier industry. *See* Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N REV. 1.

[8] *Aloha Airlines* interpreted a statute that the Court determined was expressly preemptive of the type of tax in issue from the statute's plain language. *See also Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (statutory language "plainly declares the congressional purpose") and *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 370-71 (1986) (plain meaning standard applied to entire statutory scheme).

then the clear statement standard has been met. As so applied, Congress should not be any more burdened.[9]

B. Pub. L. No. 86-272 Should Be Construed With Sensitivity To Its Effect On The Operation of State Taxation of Interstate Business In Our Federal System.

How one state construes Pub. L. No. 86-272 necessarily impacts other States. The interaction suggests a court should note the effect of its decision on other States. This recognition of the principles of multistate taxation of interstate commerce in the decision matrix will further the preservation of federalism. The Court should not be viewed as the sole protector of federalism in the constitutional system. From this perspective there are several matters the Wisconsin Supreme Court should have considered.

The Wisconsin Supreme Court should have noted that the majority of States faced with the issue have interpreted the state tax exemption of Pub. L. No. 86-272 more narrowly. Additionally, the Wisconsin Supreme Court should have considered the uniformity efforts of the Multistate Tax Commission. Consideration of these factors of course would not excuse the Wisconsin Supreme Court from making the correct determination

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[9] In those rare instances where Congress is unable to state definitively the extent of its preemptive intent, it can adopt a statutory policy statement. The policy statement would inform a court as to the limit of the congressional preemptive intent.

but deviating from them would suggest that the decision is on the warning path.

Unfortunately, the Wisconsin Supreme Court was unwilling to analyze the prevailing view seriously, dismissed the Multistate Tax Commission as a "group of state revenue agents," and made no substantial attempt to identify congressional intent. The Wisconsin Supreme Court's reliance on S. Rep. 658, 86th Cong., 1st Sess., was misplaced, because it reported a bill that was different from the enacted legislation. *See* Argument III, *infra*.

The Wisconsin Supreme Court's decision has frustrated state tax uniformity. This departure from uniformity also frustrates Congress, because any congressional law that regulates state taxation *ipso facto* seeks uniformity. Closer examination of the legislative history of Pub. L. No. 86-272 would have reflected an intent not to grant a broad tax state exemption.

As is developed in Argument III, *infra*, the deletion of the sales office exemption of section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*, reflects considerable congressional sensitivity that Pub. L. No. 86-272 not unnecessarily upset market state taxation which can cause unfair competition. The decisions of the Court even during the period it construed state taxing power restrictively under the Commerce Clause display this kind of sensitivity. *See* Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617, 629 (1939); *see also Trinova Corp. v. Michigan Dept. of Treasury*, 111 S.Ct. 818 (1991) (value added in market State). A broad construction of the state tax exemption of Pub. L. No. 86-272 flies in the face of this basic policy.

The Wisconsin Supreme Court should have recognized that a broad construction of the state tax exemption of Pub. L. No. 86-272 increase the potential for no-where income. Among other things, a broad state tax exemption increases the likelihood of having increased activities (including property and payroll) in the market State that are protected by Pub. L. No. 86-272 but not by the Due Process Clause. Apart from having apportionment factors that may be attributed to a State without jurisdiction to tax, some imply there may be an issue whether Pub. L. No. 86-272 may be used by a State having jurisdiction to tax to increase the amount of income apportioned to it. *See* Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION §9:12 p. 498 (1981). The potential for using Pub. L. No. 86-272 as a tax planning tool was not lost on Wrigley (JA 7-8; T_1: 31) or its counsel. Christopher & Janaszek, *The Scope of Protected Solicitation Under Section 381 After* Wrigley, 10 J. STATE TAX. 47 (1991).

Finally, a court should recognize that any prevailing construction Congress considers wrong can be corrected by that institution. The burden of correction is appropriately placed on business, given the limited purpose Congress had with this stopgap, temporary legislation that seeks to regulate one of the most basic of state sovereign rights.

III. AN INFORMED ANALYSIS OF THE LEGISLATIVE HISTORY SURROUNDING THE DELETION OF THE SALES OFFICE EXEMPTION FROM S. 2524 INESCAPABLY LEADS TO THE CONCLUSION THAT THE STATE TAX EXEMPTION AFFORDED BY PUB. L. NO. 86-272 SHOULD BE NARROWLY CONSTRUED AND WRIGLEY HAS EXCEEDED THE LIMITS OF THIS NARROW EXEMPTION.

The Court has recognized that the breadth of the exemption for activities embraced by the statutory term "solicitation" is narrow. *Heublein*, 409 U.S. at 280, 282 and 283 (mere solicitation). The narrow scope of the protection afforded by the term "solicitation" is well illustrated in more concrete terms by consideration of the legislative history that accompanied the approval of Senator Talmadge's amendment (105 CONG. REC. 16,477 (1959)) that deleted the sales office exemption, section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*.

The sales office exemption as contained in S. 2524 protected not only a sales office maintained by the multistate business but also a sales office maintained by a in-state resident sales representative. When Senator Talmadge's amendment to strike the sales office exemption was under floor consideration in the Senate, 105 CONG. REC. 16,469-16,477 (1959), considerable effort was made to understand the effect of deleting the provision from the enacted law. The overriding consideration in deleting the sales office exemption appears to have been the preservation of market state taxation. 105 CONG. REC. 16,472 (1959) (Exchange between Senators Holland and Talmadge.)

Beyond the concern of preserving market state taxation, the Senate floor debate reflects a clear understanding that deletion of the sales office exemption would severely limit the breadth of the state tax exemption. The following noted statements of participating Senators are telling.

- Senator Talmadge, the sponsor of the amendment, in effect declared that deletion of the sales office exemption would ensure that an out-of-state company with representatives who maintained an office would be taxable. 105 CONG. REC. 16,470-16,472 (1959) (Statements of Senator Talmadge, including the observation that striking section 101(a)(3) from the bill was intended to accomplish exactly what was sought by Senator Sparkman's amendment that would have added language to the bill, 105 CONG. REC. 16,472 (1959).)

- Senator Bennett of Utah indicated that deletion of the sales office exemption of section 101(a)(3) would result in a loss of the tax exemption as soon as the out-of-state business put a sales representative in the taxing State and supplied the representative with the minimum equipment necessary to handle the business. Senator Bennett viewed section 101(a)(2), which was enacted, as permitting a business to have a representative *come in*, and section 101(a)(3) as allowing the business to have a domiciled representative with an office. 105 CONG. REC. 16,361 (1959).

- Senator Saltonstall of Massachusetts, a strong supporter of S. 2524, confirmed these understandings, 105 CONG. REC. 16,471 (1959) (The purpose of section 101(a)(2) is to allow a sales representative to *come into* a State and merely solicit orders.), as did Senator Kerr of Oklahoma, also a strong supporter. 105 CONG. REC.

16,473 (1959) (Section 101(a)(1) and (2) viewed as only allowing salesmen to come in and solicit orders and send them out of state.)

- Most importantly, Senator Byrd, the floor manager of S. 2524, concurred in these restrictive interpretations of S. 2524 following the deletion of the sales office exemption at the critical point when the Senate voted on the amended S. 2524. 105 CONG. REC. 16,493 (bill protects only traveling salesmen who do not have any facilities) and 16,494 (bill only protects a traveling salesman who goes in and sells goods subject to consummation at the home office) (1959).

The House of Representatives appears to have understood that the Senate bill was very limited in scope in its considerations of the conference report after these Senate proceedings had concluded. 105 CONG. REC. 17,770 (Statement of Rep. Celler: mere solicitation), 17,771 (Statement of Rep. Miller: very narrow, indeed) and 17,774 (Statement of Rep. Monagan: mere solicitation) (1959).

It baffles your *Amicus* in the face of this very concrete understanding, how Wrigley can argue for a broad construction of solicitation and for a *de minimis* exception for activities that clearly violate the clarity Congress sought. A mere listing of a few of the activities undertaken by Wrigley in Wisconsin make the point without the necessity of argument.

- The Wrigley representatives were in-state residents.

- At least one of the Wrigley sales managers maintained an in-state office with equipment supplied by Wrigley.

- The Wrigley representatives maintained in-state inventory which they sold and delivered in-state. *See* 105 CONG. REC. 16,355 (1959) (Statement of Senator Byrd to effect that sale of *a* [single] sample would result in the loss of the state tax exemption); section 101(a)(1) of Pub. L. No. 86-272 (delivery from out-of-state required).

- Wrigley rented warehouse space.

- The Wrigley field representatives performed services within Wisconsin by being responsible for the quality of salable inventory of retailers and stocking new stands of gum. *See* 105 CONG. REC. 16,471 (1959) (Statements of Senators Saltonstall and Talmadge to the effect that *services* not covered by S. 2524).

IV. AN APPROPRIATE STANDARD OF SOLICITATION IN LIGHT OF THE INTENT OF CONGRESS TO GRANT A NARROW STATE TAX EXEMPTION BUT STILL OFFER SOME CERTAINTY IS TO LIMIT SOLICITATION TO ACTIVITIES THAT DIRECTLY SEEK PLACEMENT OF AN ORDER OR ARE A NECESSARY PART OF SUCH ACTIVITIES.

The appropriate gloss to place on solicitation in Pub. L. No. 86-272 is suggested not only by its limited scope but also by the need to promote certainty, if possible. Your *Amicus* believes that the standard utilized by the Multistate Tax Commission to develop the Guidelines is the appropriate standard. The Guidelines achieve as much clarity as possible without expansively defining solicitation in violation of the clearly stated intent of Congress. Your *Amicus* suggests the following:

> Solicitation constitutes activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort. If an activity serves the out-of-state seller beyond the direct attempt to secure the placement of an order, the dual purpose prevents the activity from constituting only solicitation. Solicitation with respect to indirect accounts (so-called missionary activities) is similarly limited with the adjustment being that the test is applied with respect to the seeking of the placement of an order for a customer of the out-of-state seller.

Under the proposed test, Wrigley's broad activities here in issue would not constitute solicitation, because they either were too far removed from a direct seeking of the placement of an order or because they also served a purpose of Wrigley that was separate from the securing of the placement of an order. Three brief observations explain application of the proposed test.

- The sales representatives' replacement and disposition of stale and unsalable gum and stocking of new stands did not constitute solicitation, because neither activity sought the direct placement of an order. In fact, such activities also served Wrigley's independent purpose other than the direct seeking of an order. Specifically, *free* replacement of gum can hardly be viewed as seeking an order. Further, proper disposition of unsalable product rids the marketplace of defective products. Similarly, stocking of a new stand from in-state inventory effected a quick delivery of the product when a new stand was ready to open.

- The sales representatives' assistance on credit problems did not directly seek the placement of a new order. Such activities furthered Wrigley's independent interest in collecting a past due account.

- A collateral activity that is a necessary part of an activity that directly seeks the placement of an order is an activity that must occur in order to engage in solicitation. Thus, protected activities include a sales representative's maintenance of catalogues, samples, and sales literature and the commuting to and from the business being solicited.

The test proposed here by the Multistate Tax Commission is reflected in its Guidelines. Such test is rightfully a restrictive test that is consonant with the clearly expressed intent of Congress. This test is proposed as the most desirable standard to be established for the term "solicitation" under Pub. L. No. 86-272. Even the pre-sale and post-sale test being proposed by the State of Iowa is too expansive and therefore should be viewed as a next best alternative should the Court not be inclined to accept the test proposed.

CONCLUSION

For the foregoing reasons, your *Amicus* respectfully requests that the decision of the Wisconsin Supreme Court be reversed. In reversing the decision of the Wisconsin Supreme Court, the Court should indicate that the state tax exemption of Pub. L. No. 86-272 is to be narrowly construed and that consistent with that limitation the appropriate test of solicitation is whether the activities of the out-of-state company directly seek the placement of an order or are a necessary part thereof.

Respectfully submitted,

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November 21, 1991

APPENDIX

RESOLUTION OF THE MULTISTATE TAX COMMISSION ADOPTING THE PUB. L. NO. 86-272 GUIDELINES

WHEREAS, it is in the interest of effective tax administration for tax administrators from time to time to examine their practices as to their application of nexus standards to out-of-state business organizations with respect to various state taxes; and

WHEREAS, the information regarding such practices, if made generally available to tax administrators, may result in increased uniformity in the states' practices with regard to various nexus issues; and

WHEREAS, the four primary goals of the Multistate Tax Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoid duplicative taxation; and

WHEREAS, the state members of the Commission have earlier reviewed their practices with regard to the application of nexus standards relating to sales and use taxation; and

WHEREAS, the state members of the Commission now believe that it is in the best interest of promoting the four primary goals of the Commission to describe generally their practices with regard to Public Law 86-272 and state income taxation; and

WHEREAS, the adoption of a document containing such information describing the states' practices under Public Law 86-272 is one method by which to make generally available such information relating to those practices;

NOW, THEREFORE, the Multistate Tax Commission hereby **RESOLVES** that a document to be entitled "Information Concerning Practices of Multistate Tax Commission States Under Public Law 86-272" be published by the tax administrators of the Multistate Tax Commission states which impose a corporate income tax setting forth information concerning the practices of said states in applying Public Law 86-272 to various factual circumstances; and

BE IT FURTHER RESOLVED, that any member state, if it so desires, may accept, in whole or in part, said document and may otherwise dissent from any statements contained therein, so that said document shall best reflect the present practices of the states in applying Public Law 86-272; and

BE IT FURTHER RESOLVED, that said document be reviewed no less than once every three years by each of the signatory states to confirm that its statement of practice is accurate; and, if not, said state shall amend the document with regard to any such inaccuracy; and

BE IT FURTHER RESOLVED, that it is the intent of this Resolution: (1) that the contemplated document is to be informational only concerning each state's practices in regard to Public Law 86-272 and is not to serve as a basis upon which any person may rely as to a nexus conclusion

with respect to any particular set of factual circumstances; and (2) that that person should inquire of the particular state for information as to that state's position concerning that specific set of factual circumstances.

BE IT FURTHER RESOLVED, that the Uniformity Committee of the Multistate Tax Commission place upon its agenda the issue of whether to promulgate a uniform regulation in this regard to be proposed for adoption by the member states.

Dated this 21st day of June, 1985

Multistate Tax Commission

PUBLIC LAW 86-272 GUIDELINES

[The Multistate Tax Commission has adopted the following guideline for use by its member states in determining whether a corporation has a taxable nexus within a state's borders for income tax purposes. It adopted this guideline under the title "Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272." It invites all states to adopt this guideline.]

Public Law 86-272, 15 U.S.C. 381-384, (hereafter "P.L. 86-272") restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. For the purposes of this document, the term "net income tax" shall also include a franchise tax

measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to legislative limitations, to the fullest extent constitutionally permissible. Therefore, it is also the policy of those states to construe the provisions of P.L. 86-272 narrowly so as to apply that law to only those limited circumstances clearly and reasonably intended by Congress. The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered either immune or not immune from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another signatory state for purposes of applying a throwback rule (if applicable) with respect to such sales.

I

NATURE OF PROPERTY BEING SOLD

Only the sale of tangible personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, intangibles or any other type of property is not immune from taxation by reason of P.L. 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

II

SOLICITATION OF ORDERS

For the in-state activity to be immune, it must be limited solely to *solicitation* (except for that activity conducted by independent contractors described in Section III below). If there is any other activity unrelated to solicitation, the immunity shall be lost. Examples of activities presently treated by the signatory states (unless otherwise stated as an exception or addition) as either non-immune or immune are as follows:

A. *Non-Immune Activities*:

The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.

12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining a sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:
    a. Repair shop.
    b. Parts department.
    c. Purchasing office.
    d. Employment office.
    e. Warehouse.
    f. Meeting place for directors, officers, or employees.
    g. Stock of goods.
    h. Telephone answering service.
    i. Mobile stores, i.e., trucks with driver salesmen.
    j. Real property or fixtures of any kind.
17. Consigning tangible personal property to any person, including an independent contractor.
18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in-home or otherwise).

19 Conducting any activity in addition to those described in paragraph II.B. below which is not an integral part of the solicitation of orders.

B. *Immune Activities*:

The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying samples only for display or for distribution without charge or other consideration.
3. Owning or furnishing autos to salesmen.
4. Passing inquiries and complaints on to the home office.
5. Incidental and minor advertising, i.e., notice in a newspaper that a salesman will be in town at a certain time.
6. Missionary sales activities.
7. Checking of customers' inventories (for reorder, but not for other purposes).
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

III

INDEPENDENT CONTRACTORS

P.L. 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent contractors may engage in the following limited activities in the state without the taxpayer's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the principal shall remove the immunity.

IV

MISCELLANEOUS PRACTICES

A. *Interstate Commerce.*

The only activity in the state must be in interstate commerce. If there is any other activity (except that described in II.B. or otherwise incidental to solicitation), then the immunity shall be lost.

Requisites are:

1. Approval of the sales *must* be made outside the state (except for sales by independent contractors).
2. Deliveries *must* be made from a point outside the state.

B. *Incorporated*

The immunity afforded by P.L. 86-272 does not apply to any corporation incorporated within the taxing state.

C. *Service vs. Sale*

Sales of services are not immune under P.L. 86-272. If a sale consists of a mixture of tangible personal property and services, the immunity shall be lost. Examples of such a mixture are:

1. Photographic development.
2. Fabrication of customer's materials.
3. Installation of equipment.
4. Architectural and engineering services.

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

No. 91-119

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OCTOBER TERM, 1991

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Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the respondent in the above captioned matter and supporting affirmance of the decision of the Supreme Court of Wisconsin. Written consents and the petitioner and respondent have been obtained and filed with the Clerk of Court.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), an advisory committee of the Council, consists of 365 corporate members. COST member companies conduct a substantial portion of the interstate commerce of United States taxpayers and are representative of that part of the nation's business sector which is directly affected by state taxation of interstate operations.

This case involves the interpretation of a federal statute limiting a state's ability to impose an income tax on sellers of tangible property. In practical application, the statute affects not only a state's right to impose a tax, but also the amount of income that may be subject to tax. Clearly, as corporations engaged in interstate commerce, COST member companies have a great interest in promoting the enforcement of a federal law protecting interstate commerce from unreasonable state taxation.

SUMMARY OF ARGUMENT

The sole issue in this case is the interpretation of a federal statute, 15 U.S.C. § 381 (hereinafter referred to as P.L. 86-272), which protects a business from the imposition of state tax where the only business activity within that state is the "solicitation of orders". The specific issue presented in this case is the meaning of the term "solicitation" as used in this federal statute. The term solicitation has been a "primary area of ambiguity in the statute" leaving unclear "the question of what kinds of activity may be considered an integral part of the process of solicitation". Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, Pursuant to Public Law 86-272, as amended. (hereinafter referred to as the Willis Report), at 144.

Congress determined that a nonresident business should be permitted to engage in certain minimum activities within a state without being required to file income tax returns even if the business has nexus, in the constitutional sense, with that state for tax purposes. Therefore, Congress enacted P.L. 86-272. If this legislative intent is to be effectuated, the term "solicitation" must be given a realistic interpretation. The narrow interpretation supported by a number of states, under which a person can do no more than the act of writing an order, renders P.L. 86-272 a nullity. The "middle ground" approach—the "pre-sale/post-sale" test-advocated by other states filing as *amici* in this case, fails to meet the intent of the federal law. The pre-sale/post-sale test is an unworkable test that ignores the reality of doing business in the United States.

Sales take place on a continuum. An activity that is "post" one sale is always "pre" the next sale. Thus, in order for P.L. 86-272 to have the effect intended by Congress and give business entities the necessary protection, the term "solicitation" must be interpreted to include all activities that are taken to encourage the placing of additional orders.

ARGUMENT

THE TERM "SOLICITATION" AS USED BY CONGRESS IN P.L. 86-272 MUST BE INTERPRETED IN A MANNER THAT WILL EFFECTUATE LEGISLATIVE INTENT

The issue before this Court is the interpretation of the term "solicitation" as used by Congress in P.L. 86-272.[1] The issue is simply one of interpretation of a federal law that provides that nonresidents should be allowed to engage in certain minimum activities within a state without being subjected to income taxation by that state.[2]

---

[1] P.L. 86-171 provides, in relevant part:

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State, by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, or orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

[2] Due process notions of "nexus" minimal contacts as argued in Section B of Petitioner's Brief are simply irrelevant to the present issue and must be seen as no more than an attempt to confuse the issue before this Court in the instant case. As Petitioner noted, Respondent admitted in its Brief in Opposition that such minimum contacts exist to allow the state to impose its income tax. However, this case involves transactions which are protected by a federal law, passed under Congress' authority to regulate interstate commerce. Thus, the only issue in this case is the interpretation and application of that federal law.

It is necessary to understand the problem that Congress was seeking to alleviate by enacting P.L. 86-272 in order to understand the activities permitted by P.L. 86-272 to take place within a state without subjecting a nonresident to taxation by the state. The legislative history of the Act shows that it was enacted as a result of concern expressed by the business community arising out of this Court's decision in *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959) and this Court's decision not to review *Brown-Forman Distillers Corporation v. Collector of Revenue*, 234 La. 651, 101 So.2d (1958), *cert. denied*, 359 U.S. 28 (1959) and *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So.2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959). S. Rep. No. 658, 86th Cong., reprinted in 1959 U.S. Code Cong. & Admin News, 2548 et seq. This apprehension was due in large part to the compliance burden entailed in determining income apportionable to a large number of states with inconsistent and varying tax laws. *Id.* at 2529.

> "Public Law 86-272 was enacted to . . . to establish minimum standards for the imposition of income taxes. . . . [t]he statute does alter the result in cases like *Brown-Forman* and *International Shoe* to the extent that they are authority for taxing a corporation which maintains no in-State sales office and which limits its activities to the solicitation of orders for the sale of goods." Willis Report, at 145.

It is clear that P.L. 86-272 was enacted to address concerns of the business community with regard to their ability to sell products into states without having to bear unreasonable income tax burdens. Congress intended the Act to alleviate those concerns by allowing a minimum level of activity—that is, solicitation—to take place within a state without subjecting the business to such tax burdens. The only definition the term "solicitation" that does in fact address and alleviate the concerns of the business community is one that would allow all activities that en-

courage the placing of additional orders to be included within the Act's protection. This is the only interpretation that both recognizes the reality of the marketplace and how sales are in fact made and gives credence to the Congressional intent.

Senator Byrd commented on the Senate floor that

> all in the world [P.L. 86-272] would do is to say that *business which originates from the solicitation* of a traveling salesman, who does not have an office . . . is business which shall not be taxed, as interstate commerce, in regard to income taxes.

105 Cong. Rec. 16493-16494 (1959) (emphasis added). This language in the Congressional Record shows a clear understanding that solicitation is much more than marking off an order on an order form. Rather, all activities that encourage the placement of orders are part of the solicitation of orders.

It is this continuum of activity as part of solicitation that makes the pre-sale/post-sale test endorsed by a number of states completely unworkable. This test *simply does not* provide a clear line of demarcation or create certainty on behalf of taxpayers and taxing authorities as claimed by the State of Wisconsin and other states. Petitioner's Brief at 25; *Amicus* Brief of the State of Iowa et al. at 13. This test completely ignores the reality of making sales. As recognized by the Pennsylvania Supreme Court in *U.S. Tobacco Co. v. Commonwealth of Pennsylvania*, 478 Pa. 125, 139, 386 A.2d 471, 478 (1978), *cert. denied*, 439 U.S. 880 (1978):

> "[s]olicitation" does not stop at the moment a prospective customer (or wholesaler) is asked to consider purchasing the seller's goods: other practices incident to the initial contact between buyer and seller, such as advice on making the product attractive to the ultimate customer, also fall under the rubric of solicitation.

Most importantly, as stated above, sales solicitation takes place on a continuum. There is no clear line of demarcation between sales orders when ongoing business is solicited from a wholesaler or retailer. It is totally unreasonable and impractical to expect a salesperson, after getting one order and hoping to get additional orders, is asked for some kind of assistance regarding the goods in question, to either risk the additional business by refusing to give such assistance or to make a determination whether the request involves a pre-sale or post-sale activity. All acts of courtesy and goodwill are offered with the intent to induce a sale. One must keep in mind that

> [t]he essential purpose and design of Public Law 86-272 were to grant tax immunity to out-of-state vendors who are not "local merchants," but have salesmen in the State who solicit orders for acceptance out-of-state and shipment of the goods to the customers from other States. Activities such as checking inventory, assistance in display of a promotion, dealing with shipment delays, damaged merchandise, and the like typify the customary functions of sales representatives of out-of-state merchants. Whether they occur before or after particular solicitations ought not be relevant, since the activities do tend to encourage new orders.

J. Hellerstein, *State Taxation I: Corporate Income and Franchise Taxes* at 245 (1983). This Court stated in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972) that "[c]larity that would remove uncertainty was Congress' primary goal" in passing P.L. 86-272. The pre-sale/post-sale test does not satisfy this goal. Further, this test fails to reflect the reality of doing business and the activities which are a necessary part of obtaining purchase orders, to wit, "soliciting orders".

The narrowest standard proposed must also be rejected out-of-hand as it would render P.L. 86-272 a nullity. This test, the "New Jersey/Arkansas" test, *Clairol, In-*

corporated v. Kingsley, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dismissed*, 402 U.S. 902 (1972); *U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990), would consider all activities other than the strict taking of orders as being the protection of P.L. 86-272.

> Under the strict New Jersey approach, various "pre-sale activities" carried on by multistate firms . . . , including stocking product displays and taking inventory of retailers' stock, exceed the solicitation of orders because the multistate company is directly assisting local retailers in maintaining their in-state business operations.

Amicus Brief of the State of New Jersey, and the States of Alaska and Arkansas, at 5. Under this approach, "even those [activities] which may eventually lead to increased sales" are beyond the protection of P.L. 86-272. *Id.* at 2. The New Jersey/Arkansas test is so narrow and restrictive that it gives no effect to the enactment of P.L. 86-272.

In *Brown-Forman*, *supra*, the Louisiana Supreme Court upheld the imposition of an income tax on a nonresident corporation whose activities in the State were limited to the presence of "missionary men" who called upon wholesale dealers and, on occasion, accompanied the salesmen of the wholesaler to assist them in obtaining a suitable display of the corporation's merchandise at retailers' stores. The corporation's representatives did not solicit orders from retailers, but did apparently take orders from wholesalers for out-of-state approval. This Court allowed this decision to stand, as it did in *International Shoe*, *supra*. In that case, the company's sole activity within the state was the regular and systematic solicitation of orders by salesmen who carried shoe samples and were provided with company-owned automobiles. P.L. 86-272 was intended to alter the result in these two cases. Willis Report, *supra*. However, the narrow view advocated by the States of New Jersey, Arkansas and Alaska would

reach the same result as in the pre-P.L. 86-272 Louisiana cases. Under that approach, the activities as described would exceed the "solicitation of orders", even though the Act was intended to protect just such activities. Thus, under the New Jersey/Arkansas test, the states have disregarded Congress' exercise of its Constitutional authority to regulate interstate commerce through the enactment of P.L. 86-272.

The only interpretation of the statutory language "solicitation of orders" that will effectuate Congressional intent in enacting P.L. 86-272 and which reflects the way in which the sale of goods is accomplished is the interpretation adopted by the courts in Wisconsin, Pennsylvania, *U.S. Tobacco Co. v. Commonwealth*, *supra*, Indiana, *Indiana Department of Revenue v. Kimberly-Clark Corporation*, 275 Ind. 378, 416 N.E.2d 1264 (1981), New York, *Gillette Company v. State Tax Commission*, 45 N.Y.2d 846, 410 N.Y.S.2d 65, 283 N.E.2d 764 (1978), and Missouri, *CIBA Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645 (1964)—that is, an interpretation encompassing all activities encouraging the placement of new orders.

CONCLUSION

For the foregoing reasons, the Committee on State Taxation of the Council of State Chambers of Commerce respectfully requests that the decision of the Wisconsin Supreme Court be affirmed.

Respectfully submitted,

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Dated: December 20, 1991

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